CONSUMER CREDIT AND DEBT: THE ROLE OF THE FEDERAL TRADE COMMISSION IN PROTECTING THE PUBLIC

HEARING

BEFORE THE

SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER PROTECTION

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

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WITNESSES

CONSUMER CREDIT AND DEBT: THE ROLE OF THE FEDERAL TRADE COMMISSION IN PROTECTING THE PUBLIC

TUESDAY, MARCH 24, 2009

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCE, TRADE,
AND CONSUMER PROTECTION,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to call, at 10:07 a.m., in Room 2123 of the Rayburn House Office Building, Hon. Bobby L. Rush (chairman) presiding.

Members present: Representatives Rush, Schakowsky, Sutton, Stupak, Green, Barrow, Matsui, Waxman (ex officio), Radanovich, Stearns, Whitfield, Pitts, Terry, Myrick, Gingrey, Scalise, and Barton (ex officio).

Staff present: Anna Laitin, Professional Staff; Christian Fjeld, Counsel; Michelle Ash, CTCP Chief Counsel; Valerie Baron, Legislative Clerk; Brian McCullough, Minority Senior Professional Staff; Will Carty, Minority Professional Staff; Sharon Weinberg, Minority Counsel; and Sam Costello, Minority Legislative Analyst.

OPENING STATEMENT OF HON. BOBBY L. RUSH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. RUSH. The Subcommittee on Commerce, Trade and Consumer Protection will come to order. Today's hearing is a hearing that we are anxiously awaiting to conduct. It is a hearing on Consumer Credit and Debt, the Role of the Federal Trade Commission in Protecting the Public. The chair would yield himself 5 minutes for the purposes of a opening statement. Three weeks ago, the Subcommittee on Commerce, Trade, and Consumer Protection held a hearing on abusive credit practices in the used-car industry. Today, I want to expand our inquiry into the world of consumer credit and debt in general. For the past decade, if not longer, American consumers, particularly low-income Americans, have been swimming in shark-infested waters.

Whether it is sub-prime mortgages, auto loans, or pay-day loans, too many companies have had a free reign to saddle Americans with debts they simply cannot afford. They sold their snake oil by taking advantage of the people's circumstances, or with outright deception. Unfortunately, there wasn't a strong enforcement or regulatory authority at the federal level protecting consumers from these abusive practices. The result has been a wrecked economy, and, I might add, wrecked lives.

The purpose of today's hearing is twofold. First, I want us to examine the actions taken by the Federal Trade Commission in cracking down on abusive credit practices. The FTC has broad authority under the FTC Act to enforce against "unfair or deceptive acts of practices." How was this broad authority exercised is one question that we may ask. If the Commission took insufficient action in the past, then why was that the case is another looming question. Was it political will or was it because the Commission lacks sufficient statutory authority and resources is the third question that we should explore.

Second, in this hearing, I want members of the subcommittee to deliberate on reforms that Congress can initiate to make the FTC as effective as possible in protecting consumers from abusive credit and debt practices in the marketplace. I am working on legislation that will better equip the Commission to aggressively address abusive lending practices. How can we utilize the Commission's historical authority to prohibit and enforce against unfair or deceptive acts or practices to our advantage? The FTC is America's foremost consumer protection agency, and we need to take advantage of its historical authority by enhancing the Commission's underlying regulatory and enforcement powers.

I believe the basic cornerstones of the Consumer Credit Protection Agency are already in place but some reforms are more than likely necessary. Does the Commission need more resources? Should the Commission be given regulatory or rulemaking authority under the Administrative Procedures Act to replace its current, burdensome rulemaking process under Magnusson-Moss? Should the Commission be given additional civil penalty authority? If the FTC has one hand tied behind its back, I believe that we should untie that one hand, but if we do so, we must be assured that the Commission will aggressively utilize these tools to protect consumers to the fullest extent.

Today, I want to explore how the FTC can be equipped to adequately deal with not only today's abusive practices, such as subprime mortgages and pay-day loans, but also tomorrow's unforeseen snake oil that will be sold to consumers in the future. I want to congratulate and welcome the new chairman of the FTC, Mr. Jon Leibowitz. I have had the opportunity to meet with him, and I find him an outstanding and fine gentleman and a dedicated public servant. And this is his first appearance on Capitol Hill as chairman of the FTC. And I hope that this hearing today will be first in a series of constructive hearings. As chairman of this subcommittee, I want to have a constructive relationship with Chairman Leibowitz and with our friends at the Commission to ensure that both Congress and the FTC are doing everything we can to protect the American consumers, particularly poor American consumers, from the unfair, deceptive, and abusive practices that are far too prevalent in the American economy. With that, I yield back the balance of my time.

[The prepared statement of Mr. Rush follows:]

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Statement by the Honorable Bobby L. Rush, Chairman Subcommittee on Commerce, Trade and Consumer Protection for Hearing on Consumer Credit and Debt: The Role of the Federal Trade Commission in Protecting the Public

March 24, 2009

WASHINGTON, DC — "The Subcommittee will come to order. Three weeks ago, the Subcommittee on Commerce, Trade, and Consumer Protection held a hearing on abusive credit practices in the used-car industry. Today, I want to expand our inquiry into the world of consumer credit and debt in general. For the past decade if not longer, American consumers, particularly low-income Americans, have been swimming in shark-infested waters. Whether it is sub-prime mortgages, auto loans, or pay-day loans, too many companies have had a free reign to saddle Americans with debts they simply cannot afford. They sold their snake oil by taking advantage of circumstances people faced, or with outright deception. Unfortunately, there wasn't a strong enforcement or regulatory authority at the federal level protecting consumers from these abusive practices. The result has been a wrecked economy and wrecked lives.

"The purpose of today's hearing is twofold. First, I want us to determine what action the Federal Trade Commission has taken in cracking down on abusive credit practices. The Commission has broad authority under the FTC Act to enforce against "unfair or deceptive acts or practices." How was this broad authority exercised? If the Commission took insufficient action in the past, why was that the case? Was it political will or because the Commission lacks sufficient statutory authority and resources?

- more -

"Second, in this hearing I want members of the subcommittee to deliberate on reforms that Congress can initiate to make the FTC as effective as possible in protecting consumers from abusive credit and debt practices in the marketplace. I am working on legislation that will better equip the Commission to aggressively address abusive lending practices. How can we use the Commission's historical authority to prohibit and enforce against "unfair or deceptive acts or practices" to our advantage? I believe the FTC is America's foremost consumer protection agency; and we need to take advantage of its historical authority by enhancing the Commission's underlying regulatory and enforcement powers. Does the Commission need more resources? Should the Commission be given regular rulemaking authority under the Administrative Procedures Act to replace its current, burdensome rulemaking process under the Magnusson-Moss Act? Should the Commission be given additional civil penalty authority? If the FTC has one hand tied behind its back, then should we untie it? And if so, how can we be assured that the Commission will aggressively utilize these tools to protect consumers to the fullest extent? Today, I want to begin to explore how the FTC can be equipped to adequately deal with not only today's abusive practices, such as sub-prime mortgages and pay-day loans, but also tomorrow's unforeseen snake-oil that will be sold to consumers in the future.

"With that, I want to congratulate and welcome the new Chairman of the Federal Trade Commission, Jon Leibowitz, and I hope this hearing will be the first in a series of constructive hearings involving the FTC. As Chairman of this subcommittee, I want to have a constructive relationship with Chairman Leibowitz and the Commission to ensure that both Congress and the FTC are doing everything we can to protect American consumers, particularly poor American consumers, from the unfair, deceptive, and abusive practices that are far too prevalent in our economy.

"With that, I yield back the balance of my time."

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Mr. RUSH. And now I recognize my friend, the ranking member of this subcommittee, the gentleman from Georgia, Mr. Radanovich, for 5 minutes for the purposes of an opening statement.

OPENING STATEMENT OF HON. GEORGE RADANOVICH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. RADANOVICH. Thank you, Mr. Chairman. I want to thank you so much for holding today's hearing on the FTC's role in financial consumer protection. Given the current economic downturn and the slow thawing freeze in the credit markets, this discussion is particularly timely. Abuses must have the disinfectant of sunlight shone brightly on them, and it is our responsibility as representatives of our constituents to examine the protections afforded to consumers by the law. Any credit scam that takes advantage of innocent consumers is deplorable and we must have our regulators pursue all those responsible for this kind of despicable crime behavior with vigor.

My district is located in California San Joaquin Valley, which is suffering from one of the Nation's highest foreclosure rates due to the easy availability of credit, unfortunately, so the easy money was available to consumers because of deception and fraud. These were cases of mortgage fraud, appraisal fraud, and income fraud that all played a part in creating the current mess that we are in. It is reprehensible that people who may have been taken advantage of when they bought their house could now be victims in their time of need. Today, we focus on the Federal Trade Commission's efforts. The FTC deals with matters that affect the economic life of all our constituents. The Commission's consumer protection mission is to ensure consumers are protected from unfair and deceptive practices in or affecting commerce. That Herculean task puts the Commission in the position of overlooking a multitude of industries, and the Commission's responsibility to protect consumers of financial service products are a critical part of this work.

The Commission helps to protect consumers at every stage of the consumer credit market from the advertising and the marketing of financial products to debt collection and debt relief. However, the Commission's legal authority does not extend to all entities that provide financial services to consumers. The FTC Act and the statutes the Commission enforces specifically exempt banks, thrifts, and federal credit unions. The FTC, however, had jurisdiction over non-bank financial companies including non-bank mortgage companies, mortgage brokers, and finance companies.

As the lead consumer protection agency, it has the expertise and the experience that was recognized by our colleagues on the House Financial Services Committee last Congress. They developed legislation to improve the existing framework of the consumer protection regulations to better coordinate banking regulators rulemakings with those of the Commission, and while avoiding duplicative efforts in the government this coordinated approach to protect consumers of financial services is essential. The same rule should apply regardless of what entity sells the product. I am anxious to hear about the FTC's recent activity in this area, the cooperative efforts among agencies, and whether these efforts are effective.

I do have concerns about some of the reforms that have been discussed over the years that would change how the Commission operates. As I mentioned, the FTC's jurisdiction is enormous. Except for the few exempted entities, the Commission's authority to promulgate regulations impacts nearly our entire economic spectrum. Unlike some other agencies who promulgate rules using the procedures of the Administrative Procedures Act, the FTC's rulemaking process is laid out in the Magnusson-Moss FTC Improvement Act. Congress established the Magnusson-Moss rulemaking procedures in the 1970's specifically to be more rigorous than the APA process, in part, to provide affected industries the opportunity to present arguments in an evidentiary hearing.

The FTC must base any rule on that hearing record and substantial evidence must be presented to justify it. I am concerned that any significant change to this process would not allow for such careful consideration before rules are finalized. Congress set up the Magnusson-Moss process to be intentionally deliberative, but Congress also has been highly effective in enacting consumer protection legislation on specific issues and providing the Commission with APA rulemaking authority in those cases where it is warranted, such as the Do Not Call Act.

I want to thank all our witnesses for being here today, and I look forward to their insight and expertise on how consumers can be best protected. I am particularly interested in hearing if there are any holes in the current law which prevent the FTC from pursuing bad actors and whether or not additional regulations would be effective in deterring unscrupulous lenders and others. If the testimony and the evidence we receive lead to the conclusion that the Commission should be doing more, including regulating entities that it currently does not, I stand ready to work with you, Mr. Chairman, to develop the appropriate legislation. Thank you, Mr. Chairman, and I yield back.

Mr. RUSH. The chair thanks the gentleman. Now it is my privilege to recognize the chairman of the full committee for 5 minutes for the purposes of opening statements, the gentleman from California, Chairman Waxman.

OPENING STATEMENT OF HON. HENRY A. WAXMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. WAXMAN. Thank you very much, Mr. Chairman. I want to commend you for holding this hearing, and the fact that your subcommittee is taking a close look at consumer protection in the area of credit and debt. This committee has an important role in ensuring that consumers are protected from unfair, abusive, and deceptive practices throughout the marketplace, including the credit market, and I am pleased to join you in welcoming the chairman, the new chairman, of the Federal Trade Commission, Jon Leibowitz. Congratulations on your appointment. I look forward to working with you on this and other issues before our committee.

The current financial crisis has brought to light a host of schemes that have hurt both individual consumers and the economy as a whole, mortgages have required no money down and no proof of income or assets, pay-day lenders who charge 500 percent interest for a short-term loan, companies that take money from individuals based on false offers or they offer to fix a credit report or save a home from foreclosure. These are schemes, and they are allowed to happen because of a fierce anti-regulatory ideology that was prevailing at least in the last 8 years. The philosophy was the government was the source of the problem, that it posed obstacles to success and that it should be slashed wherever feasible. This was the ideology that led to FEMA's failure during Hurricane Katrina, billons of dollars of contracting abuse at the Defense Department, and a food safety system that could not keep unsafe peanuts and spinach off the grocery shelves.

The agencies of government responsible for protecting our financial system and Americans' hard-earned assets also suffered under this ideology. There was a feeling that government should step aside and markets should be allowed to work with little or no regulatory intervention. Now we have an opportunity to move beyond the flawed system of the previous 8 years and strengthen consumer protections across the financial system. Today's hearing focuses on the Federal Trade Commission which plays an essential role in overseeing consumer credit. An aggressive and rejuvenated FTC could prevent unfair and deceptive practices before they become commonplace, and it could use its enforcement authority to deter fraudulent schemes.

I look forward to working with you, Mr. Chairman, and the members of this committee to making sure that the FTC has the authority, the resources, and the will to be an aggressive consumer protection agency. I yield back the balance of my time.

Mr. RUSH. The chair thanks the chairman, and now recognizes the gentleman from Pennsylvania for 2 minutes for the purposes of opening statement, Mr. Pitts from Pennsylvania.

OPENING STATEMENT OF HON. JOSEPH R. PITTS, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF PENNSYLVANIA

Mr. PITTS. Thank you, Mr. Chairman. Thank you for holding this important hearing on the role of the Federal Trade Commission and protecting consumers of credit and debt. I think we all agree that we need to ensure that strong consumer protection measures are in place. The recent housing and the credit crises our country has faced has made that abundantly clear. We must do this prudently though, avoiding duplicity and jeopardizing processes that work well, and this is why we should examine legislation already in place to see if it has been successful in protecting consumers. While there may be room for improvements in our consumer protection laws, we should also consider that a complete overhauling of legislation may actually force negative and overly burdensome requirements on those who are being truthful and honest.

Again, we all desire effective and efficient enforcement of consumer protection laws, and it is my hope that this committee moves forward in a wise, careful, and deliberative manner, and I look forward to hearing our distinguished witnesses today. Thank you, and yield back.

Mr. RUSH. The chair thanks the gentleman. And the chair now recognizes the gentlelady from California, my friend, Ms. Matsui, for 2 minutes for the purposes of opening statement.

OPENING STATEMENT OF HON. DORIS O. MATSUI, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. MATSUI. Thank you, Mr. Chairman. Thank you very much for calling today's hearing. I applaud your leadership on this issue. I would also like to thank Chairman Leibowitz for being here today with us and congratulate him also. In today's economic recession, many families in my home district of Sacramento are really struggling to make ends meet. I have heard countless stories about people struggling to keep their homes, their jobs, and their way of life. As we all know, the housing crisis has had an unprecedented effect on our economy. The rising unemployment will cause even more Americans to face foreclosure. California, and in particular my home district of Sacramento, has been greatly impacted by the foreclosure crisis. Many of my constituents were victims of predatory lending and were steered into high cost, bad loans. Now many of these homeowners are seeking assistance in modifying their loans to more affordable loan terms.

However, that has been a serious issue for many. In some cases, their original loan company is not a business or in some cases their lenders or services are not being responsive leaving struggling homeowners feeling desperate to save their homes. As a result, many have been tricked into contacting scam artists posing as so-called foreclosure consultants or the so-called agencies to save their homes. These scams are costing thousands of dollars and false promises to struggling homeowners.

I am a member of the Sacramento District Attorney's Foreclosure Task Force, which is charged with cracking down on mortgage fraud. Many of these unfortunate scams have been well documented in my district. It is clear that consumers are not being properly protected from these shameful, unacceptable practices. We are here today to determine what more the government can and should do to stop these abuses from occurring today and in the future. I think you once again, Mr. Chairman, for holding this important hearing today, and I yield back the balance of my time.

[The prepared statement of Ms. Matsui follows:]

NEWS RELEASE

Hon. Doris O. Matsui

Member of Congress

Doris O. Matsui

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Tuesday, March 24, 2009

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Congresswoman Doris Matsui Advocates for Increased Consumer Protection Against Loan Modification Scams

Presses Federal Trade Commission for Full Disclosure to Consumers of Financial Terms on New and Existing Loans

WASHINGTON, D.C. – Rep. Doris Matsui (CA-05) spoke at the Commerce, Trade, and Consumer Protection Subcommittee Hearing today on the topic of "Consumer Credit and Debt: the Role of the Federal Trade Commission (FTC) in Protecting the Public." Below are her remarks as prepared for delivery:

"Chairman Rush, thank you for calling today's hearing. I applaud your leadership in addressing this important issue. I would also like to thank Chairman Leibowitz and the rest of our panelists for sharing their expertise with us. In today's economic recession, many families in my home district of Sacramento are struggling to make ends meet. I have heard countless stories of people losing their homes, their jobs, and their way of life.

"As we all know, the housing crisis has had an unprecedented effect on our economy. The rising unemployment will cause even more Americans to face foreclosure. California, and in particular, my home district of Sacramento, has been greatly impacted by the foreclosure crisis. Many of my constituents were victims of predatory lending and were 'steered' into high-cost, bad loans.

"Now many of these homeowners are seeking assistance in modifying their loans to more affordable loan terms. However, that has been a serious issue for many. In some cases, their original loan company is not in business or in some cases, their lenders or servicers are not being responsive, leaving struggling homeowners feeling desperate to save their homes.

"As a result, many have been tricked into contacting scam artist posing as so-called 'foreclosure consultants' or 'government agencies' to save their homes. These scams are costing thousands of dollars and false promises to struggling homeowners. I am a member of the Sacramento District Attorney's Foreclosure Task Force, which is charged with cracking down on mortgage fraud. Many of these unfortunate scams have been well documented in my district. It is clear that consumers are not being properly protected from these shameful, unacceptable practices.

"We are here today to determine what more the government can and should do to stop these abuses from occurring today and in the future. I thank you Mr. Chairman for holding this important hearing today."

Mr. RUSH. The chair thanks the gentlelady. The chair now recognizes the ranking member of the full committee, my friend from Texas, Mr. Barton, for 5 minutes for the purposes of opening statements.

Mr. BARTON. Thank you. And I haven't forgotten about that cowboy hat, Mr. Chairman.

Mr. RUSH. I thank you very much.

Mr. BARTON. It is on order.

Mr. RUSH. All right.

Mr. BARTON. The hat is in the mail.

Mr. RUSH. The hat is in the mail. All right.

OPENING STATEMENT OF HON. JOE BARTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. BARTON. Thank you for this hearing today, Mr. Chairman. Its title, Consumer Credit and Debt: The Role of the Federal Trade Commission in Protecting the Public, is an important one. As you know, the subcommittee in the past has explored a multitude of consumer protection issues. We have looked into data security, spyware, spam, and children's on line privacy. We have inquired about how Social Security numbers are abused. We have investigated calling cards and also telemarketing. These areas are important and it is fitting that today we are considering consumer protection particularly given our current economic environment.

The fraud in consumer credit is considerable, its ramifications beyond those suffered by the victims. The fall out often damages the businesses with whom the consumer interacts and it nearly always harms consumers at large. Losses reach into the millions of dollars every year and the cost is borne by all of us. We know that the FTC is a strong advocate for consumers policing that activity of those fraudsters who seek to take advantage of consumers in a most repugnant way. I am interested today to learn what the chairman, Mr. Leibowitz, has to say about the tools that his agency has in its toolbox, how it complements the actions of sister agencies with similar authority and the state attorneys general and what additional tools, if any, the Commission needs.

Let me add a cautionary note, however. I support efforts to strengthen the Commission's authority where necessary. I am aware too that several stakeholders believe the Commission's authority must be strengthened by eliminating the rulemaking requirements of the Magnusson-Moss Act in 1975 in favor of the Administrative Procedures Act. As we move forward in this debate, I would ask yourself, Mr. Chairman, and the members of this subcommittee, to remember the reasons that Congress imposed the Magnusson-Moss requirements in the first place. The FTC oversees an enormous jurisdiction. Its rules reach into enumerable industries and affect every commercial main street in the country. Given the breadth of that impact, Congress believes that the Commission should take more than 180 days so that it could carefully consider its broad sweeping rulemakings and the comments generated by that consideration. We still have the power here to permit the FTC to side step the Magnusson-Moss Act when necessary and permit rulemaking under APA where it is appropriate and necessary.

This is an ability this committee has never had a problem utilizing when we found a situation that warrants it. Again, thank you, Mr. Chairman, for holding the hearing. I want to thank our witnesses, and I look forward to reviewing their testimony.

Mr. RUSH. The chair thanks the ranking member. Now the chair recognizes the gentleman from Georgia for 2 minutes for the purposes of opening statement of Mr. Barrow.

Mr. BARROW. I thank the chair. I will waive an opening.

Mr. RUSH. The gentleman desires 2 minutes in addition to the 5 minutes that he is granted for questioning. So granted. The chair now recognizes my friend and vice-chair of the subcommittee, the gentle woman from Illinois, Ms. Schakowsky, for 2 minutes for the purposes of opening statement.

OPENING STATEMENT OF HON. JANICE D. SCHAKOWSKY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Ms. SCHAKOWSKY. Thank you, Mr. Chairman, for holding this hearing. And congratulations to you, Mr. Leibowitz. We are glad to have you here. The repercussions of years of irresponsible mortgage lending continued to unfold. According to the Center for Responsible Lending, there have been nearly 550,000 new foreclosure filings since 2009 began, 6,600 each day or 1 every 13 seconds. We were trying to calculate how many since this hearing began. It is more than 100, in every 13 seconds yet another. In my State of Illinois more than 100,000 families are projected to lose their homes to foreclosure this year, and this Administration and this Congress are obviously taking steps to mitigate this crisis and ensure it never happens again.

But to do that, I really think we have to ask how did we get here. We are here not just because the banks were a problem, and it is not just bank lending that is responsible for billions of dollars worth of bad loans that now must be dealt with in order to put our economy back on track. Lending by non-bank entities has exploded in recent years and a major factor in today's financial crisis Country Wide and other non-bank mortgage lenders are responsible for 40 percent of the home loans made in 2007 and 55 percent of the sub prime loans. It was the Federal Trade Commission's responsibility to exercise oversight of these mortgages where abusive practices have hurt consumers. Clearly, they missed something.

The FTC's authority extends to, it is my understanding, auto loans, pay-day loans, car title loans, and other non-traditional forms of credit that often flows to non-bank entities and currency exchanges. We have those in Chicago big time. It is a vital role of this subcommittee to exercise oversight over FTC and its rulemaking enforcement actions over non-bank lenders, and I look forward to working with you, our committee does, to make sure that these improvements are made as we move forward. I thank you again, Mr. Chairman.

Mr. RUSH. The chair thanks the gentlelady. The chair now recognizes the gentleman from Georgia, Dr. Gingrey, for 2 minutes for the purposes of an opening statement.

OPENING STATEMENT OF HON. PHIL GINGREY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Mr. GINGREY. Mr. Chairman, I thank you for calling the hearing today on such an important issue. It hadn't been examined in depth by this committee since 106th Congress. I join with my colleagues in congratulating the new chairman of the FTC, Jon Leibowitz, and I look forward to his testimony. I think one of the most important things as we go forward is to strike a balance. And we heard testimony from our distinguished chairman a little bit earlier in regard to, and I paraphrase, the government during the past 8 years, at least the past 8 years, has taken sort of a hands-off or soft approach to regulation to the detriment of consumers. Well, in the first 60 days of the current Administration very aggressive intervention by the government led to over $200 million of egregious loans to AIG executives, so this is I think a perfect example of why we need to strike a balance.

No doubt both lenders and borrowers can share the blame for elements of the current credit climate within the economy, and as the economy begins to work toward recovery one of the basic ways in which we can work in a bipartisan manner to prevent these problems from occurring again is through consumer credit reform. Unfortunately, there will always be bad actors within the financial and credit markets, and this committee hopefully will play a role in mitigating this in the future. First and foremost, credit scams that take advantage of innocent consumers are absolutely shameful. However, before we look to expand the role and the duties of the FTC, it is imperative that we examine how the FTC could be more effective given its current and very broad set of responsibilities.

Mr. Chairman, moving forward, we must ensure that there continues to be strict scrutiny and transparency within the rulemaking process of the FTC. The Magnusson-Moss rulemaking structure is unique because in order to ensure transparency it was specifically designed in the 70's to be difficult to make sporadic whimsical changes. As we are about to begin this hearing and future deliberation on the legislative changes to the FTC, I am reminded of the words of Speaker Pelosi when she took the gavel at the start of the 110th. She guaranteed that it would be the most open and honest Congress in the history of our Nation. I hope that this subcommittee takes heed of these words as we begin to modify the role.

Mr. Chairman, transparency is everything, and with that I look forward to the testimony of the Honorable Jon Leibowitz, and I thank you so much for holding the hearing.

Mr. RUSH. The chair thanks the gentleman. The chair now recognizes the gentlelady from Ohio, Ms. Sutton, for 2 minutes for the purposes of opening statement.

OPENING STATEMENT OF HON. BETTY SUTTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Ms. SUTTON. Thank you so much, Mr. Chairman. Thank you for holding this hearing. It is extremely important to the people that I represent in Ohio. You know, time and time again we have learned that sometimes the people who are hurt the most by what is going on out there are the ones who need our help the most. Today there are a wide range of financial products advertised to assist consumers in paying off debt and emerging from debt from pay-day lending to car title loans, short-term loans with incredibly high interest rates all but ensure that individuals remain in debt, and these individuals, many of them, are my constituents. The American people expect their government to rein in unscrupulous and unfair lending. Last November, voters in Ohio overwhelmingly improved a referendum on pay-day lenders to end predatory loans.

Our referendum capped interest rates provided borrowers with more time to pay back loans and prohibited new loans to pay off old ones which will help to break that cycle of debt. However, we are now learning that these lenders are exploring new loopholes and operating under different licenses and adding new fees such as inflated check cashing fees for checks they have just printed and even as our Attorney General, Richard Cordray, and our state legislature and our governor are working to address this situation, the Federal Trade Commission must aggressively act as the American people expect. While I used Ohio as an example, this is a problem that severely impacts people in need throughout our country and if the Federal Trade Commission does not have the tools or the authority to aggressively protect Americans, then it is our responsibility to strengthen the Commission and restore Americans' confidence, and I look forward to being a part of making that happen.

Mr. RUSH. The chair thanks the gentlelady. And now it is my pleasure to recognize the gentleman from Louisiana, Mr. Scalise, for the purpose of 2 minutes of opening statement.

OPENING STATEMENT OF HON. STEVE SCALISE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA

Mr. SCALISE. Thank you, Mr. Chairman. I appreciate you holding this hearing. Fraudulent and deceptive practices that prey upon consumers are deplorable and shameful especially during these tough economic times because consumers are even more vulnerable to unethical scams. We need to make sure that the FTC is fully utilizing the tools they already have available to them and also ensure that the FTC is working with our local, state attorneys general, those people that are closest in many cases to the practices of those illegal and unethical practices that are going on where we would have the ability to actually go and get prosecutions and root out the things that are being done to take advantage of our consumers in this country.

Another critical issue that we need to look at is the coordination with other federal agencies like the FBI, who are also involved in some of these investigates themselves as well as local attorneys general that were not duplicating the scarce resources that we do have, so I look forward to hearing from Chairman Leibowitz of the Federal Trade Commission, and yield back the balance of my time.

Mr. RUSH. The chair thanks the gentleman. The chair now recognizes my friend, my colleague, my classmate, the gentleman from Texas, Mr. Green, for 2 minutes for the purposes of opening statement.

OPENING STATEMENT OF HON. GENE GREEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. GREEN. Mr. Chairman, thank you for your friendship over the last 17 years. I thank you for holding this hearing on the consumer credit and debt protection and to look at the role that the FTC should play. I would like to welcome our new FTC chairman, Jon Leibowitz, and congratulate him on the new position as the chair of the Commission. I look forward to working with you. The FTC is important all the time but in this day and time it is even more so. As the primary federal agency that enforces consumer credit laws at entities other than banks, the thrifts and federal credit unions, the FTC has broad responsibility regarding consumer financial issues in the mortgage market including those involving mortgage lenders, brokers, and services.

The FTC enforces a number of federal laws governing mortgage lending, Truth in Lending Act, the Home Ownership and Equity Protection Act, and the Equal Credit Opportunity Act. The Commission also enforces Section 5 of the Federal Trade Commission Act which more generally prohibits unfair and deceptive acts or practices in the marketplace. That is probably one of the most important that we can deal with. In addition, the Commission enforces a number of other consumer protection statutes that govern financial services including Consumer Leasing Act, Fair Debt Collection Practice Act, the Fair Credit Reporting Act, the Credit Repair Organization Act, and the privacy provisions of the Gramm-Leach-Bliley Act.

I also have a particular concern about non-traditional loans such as pay-day loans and car title loans, which can carry enormous interest rates and fees. In 2006, Congress enacted to cap the pay-day loans made to military personnel to a 36 percent annual percentage rate after pay-day loans grew 34 percent to reach a total of 500 million the previous 2 years. That figures has doubled since 2002. In an economic climate such as the one we are in today where credit availability is shrinking consumers may be more inclined to turn to these options which are much less regulated and therefore the potential for predatory practice is much greater. In recent months, the FTC has taken significant steps to protect consumers and crack down on scam artists by going after Internet pay-day lenders, alleged mortgage foreclosure rescue companies, and companies claiming they remove negative information from the consumers' credit reports.

I look forward to hearing what other actions the FTC is making to protect consumers, what tools it may need from Congress, and what the rest of our witnesses believe could be done better to protect consumers in today's volatile economic environment. All told, this gives the FTC broad authority to go after those predatory practices. The Congress may need to act particularly to give FTC authority to issue rules under the Administrative Procedures Act. Again, Mr. Chairman, thank you for calling the hearing, and I appreciate the opportunity.

Mr. RUSH. The chair thanks the gentleman. The chair now recognizes my friend from Florida, Mr. Stearns, for 2 minutes for the purposes of an opening statement.

OPENING STATEMENT OF HON. CLIFF STEARNS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. STEARNS. Good morning, and thank you, Mr. Chairman. Welcome the new chairman. Mr. Leibowitz had been on the FTC as commissioner, I think, since September, 2004, so we have someone, Mr. Chairman and members, who is experienced and can help us out. He has seen some of the problems and some of the accomplishments. Obviously, as members have talked about, the current financial situation and housing crisis has brought a lot of relevant consumer protection issues to the forefront and we need to see how much more authority we should give the Federal Trade Commission. Something that no one has mentioned is perhaps giving them more jurisdiction over the banks to credit unions and the thrifts that my colleague from Texas mentioned they do not have jurisdiction, and of course that is 75 percent of the credit cards, so I think the people across the hall here will probably not like that, but it would fall in their jurisdiction. I think it is something that we should not not discuss.

The FTC has authority, but as I pointed out earlier, it is sort of limited because 75 percent of the credit cards go through credit union, banks, and thrifts. But they can issue and prohibit unfair and deceptive acts, particularly dealing with advertising. The FTC's stated goal is to protect consumers at every stage of the credit life cycle by both the FTC and consumer protection groups acknowledge that more can be done to protect consumers. And I think with his over 4 years experience as a commissioner he will certainly have some ideas that bring it to bear on this problem. The FTC has taken more aggressive action, I think, more recently against companies such as Internet pay-day lenders and credit repair companies who purposely deceive consumers, but the issue of whether the FTC should expand its jurisdiction, as I mentioned earlier, is still up in the air. It should be something of consideration.

But I look forward, Mr. Chairman, in a bipartisan manner to see what we can do to help the Federal Trade Commission, and I appreciate you having this hearing. Thank you.

Mr. RUSH. The chair thanks the gentleman. Now all the members of the subcommittee have had an opportunity to issue opening statements. And it is now my distinct honor and privilege to welcome the new chairman of the FTC, Mr. Jon Leibowitz, to this committee. I want to say, Mr. Liebowitz, we are excited about your chairmanship. We look forward to working with you and look forward to having a meaningful and productive relationship on behalf of the American people. First of all, it is the practice of the subcommittee beginning with this Congress to swear in all witnesses so would you please stand up and raise your right hand?

[Witnesses sworn.]

Mr. RUSH. Let the record reflect that the witnesses all answered in the affirmative. Chairman Leibowitz, you are now recognized for 5 minutes for purposes of an opening statement.

TESTIMONY OF HONORABLE JON LEIBOWITZ, CHAIRMAN, FEDERAL TRADE COMMISSION

Mr. LEIBOWITZ. Thank you, Mr. Chairman, Mr. Radanovich, Ms. Schakowsky, members of the subcommittee, I am Jon Leibowitz. I am the chairman of the Federal Trade Commission, and I really do appreciate the opportunity to appear before you today to discuss the FTC's role in protecting consumers from predatory financial practices. This is my first hearing of several you mentioned, and let me just say this. You are an authorizing committee. We want to work with all of you. We will not be successful agency unless we can work together, and I hope that we will be doing that over the coming weeks and months. The Commission's views are set forth in the written testimony which was approved by a vote of the entire Commission, though my answers to your questions represent my own views.

Mr. Chairman, during these times of difficulty for so many American consumers, the FTC is working hard. Whether Americans are trying to stave off foreclosure, lower their monthly mortgage payments or deal with abusive debt collectors the FTC is on the job enforcing the law, offering guidance, and in the process of issuing new regulations. The written testimony describes in great detail the Commission's enforcement, education, and policy tools and how we have used those tools to protect and advocate for consumers of financial services. We brought about 70 cases involving financial services since I came to the Commission 4–1/2 years ago, and we have gotten $465 million in redress for consumers over the past 10 years in this area alone.

But let me highlight just a few recent cases. In the fall, Bear Stearns and its EMC subsidiary paid $28 million to settle Federal Trade Commission charges of illegal mortgage servicing practices. For example, they misrepresented the amounts consumers owed. They collected unauthorized fees. They made harassing and deceptive collection calls. In January we sent out more than 86,000 redress checks, 86,000, to reimburse consumers who were harmed. And today the FTC announced two more cases against so-called mortgage rescue operations that allegedly charged thousands of dollars in upfront fees but failed to provide any assistance in saving people's homes.

Even worse, these scurrilous companies Hope Now and New Hope gave consumers false hope by impersonating the HUD-endorsed Hope Now alliance, which helps borrowers with free debt management and credit counseling services, mostly low income consumers. I am pleased to report that the courts have issued temporary restraining orders stopping these fraudulent claims and freezing the company's assets. We are announcing a third action today against yet another rogue rescue scam. Less than 2 weeks ago, FTC investigators discovered a foreclosure rescue web site that was impersonating the HUD web site itself. The HUD inspector general had the site taken down. Last week, however, we were told that the same site had popped up again on a differed ISP.

Within hours, we filed a complaint against the unknown operators of the site, and armed with a court order we shut it down. Let me assure you, particularly in this economic climate the FTC will continue to target fraudulent mortgage rescue operations, but we can do better and we will. Mr. Chairman, you mentioned the lack of statutory authority, the one hand tied behind our back. First, we are going to vigorously enforce new mortgage rules issued by the Federal Reserve Board that go into effect this fall that will prohibit a variety of unfair, deceptive, and abusive mortgage advertising, lending, appraisal, and servicing practices such as banning subprime buyer's loans.

Second, the 2009 Omnibus Appropriations Act gave us authority to find violators in this area for the first time. And, third, we are going to use the regulatory authority given to use by the Omnibus to issue new regulations that will protect consumers from other predatory mortgage practices. We expect these rules to address foreclosure rescue scams and unfair and deceptive mortgage modification and servicing practices. At the same time, we are going to focus more attention on empirical research about how to make mortgages and other disclosures more effective so that consumers have accurate, easily understandable information about a mortgage's terms.

We have put a prototype disclosure form on your desks. It is clearly better, and we have copy tested this, than what people are using under current law. But we could use more help. FTC law enforcement would be a greater deterrent if we were able to obtain civil penalties for all unfair and deceptive acts and practices related to financial services beyond mortgages, for example, in-house debt collection and debt negotiation. The FTC could also do more to assist consumers if it could use streamlined APA rulemaking procedures to promulgate rules for unfair acts and practices related to financial services other than mortgage loans. These steps, of course, would require congressional action. They may perhaps require some more resources.

Will all these measures be enough? Well, they could certainly help to ensure that we are never in this kind of economic mess again. Finally, Mr. Chairman, as you know, right now jurisdiction is balkanized between the FTC and the banking agencies about who protects American consumers from deceptive financial practices. Several bills have been introduced that call for an overall federal consumer protection regulator of financial services. As discussions about these proposals continue, we urge you to keep this in mind. The FTC, the Commission, has unparalleled expertise in consumer protection. That is what we do.

We are not beholding to any providers of financial services, and we have substantial experience effectively and cooperating working with the states, especially cooperatively working with the states. In short, if your committee and if Congress determines that such an overall federal regulator is needed, if you do, we ask that the FTC be an integral part of the discussion about how to best protect the American public. Thank you, Mr. Chairman, for the opportunity to speak today about what the FTC has done and what we are going to do. We look forward to working with this committee, and I am pleased to answer your questions. Thank you.

[The prepared statement of Mr. Leibowitz follows:]

PREPARED STATEMENT OF

THE FEDERAL TRADE COMMISSION

on

"Consumer Credit and Debt:

The Role of the Federal Trade Commission in Protecting the Public"

Before the

HOUSE COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER PROTECTION
UNITED STATES HOUSE OF REPRESENTATIVES

Washington, D.C.
March 24, 2009

I. Introduction

Chairman Rush, Ranking Member Radanovich, and members of the Subcommittee, I am Jon Leibowitz, Chairman of the Federal Trade Commission ("FTC" or "Commission").[1] I appreciate the opportunity to appear before you today to discuss the Commission's efforts to protect consumers from predatory lending practices and other illegal acts and practices relating to financial services.

The Commission protects consumers from harmful acts and practices at every stage of the credit life-cycle, from when credit is first advertised to when debts are collected. At the early stages of the cycle, the FTC protects consumers from the unfair, deceptive, or otherwise unlawful acts and practices of brokers, lenders, and others who advertise or offer credit. The agency also protects consumers at the middle stages of the credit life-cycle from the unlawful conduct of creditors and servicers who collect payments from consumers who are current on their debts. At the later stages of the cycle, the Commission protects consumers who are delinquent or in default on their debts from the unlawful acts and practices of debt collectors, credit repair companies, debt settlement firms, and mortgage foreclosure scam artists.

The FTC believes that its past efforts have provided important protections to American consumers throughout the credit life-cycle. The agency, however, also recognizes that it must do more. To allow the FTC to perform a greater and more effective role in protecting consumers, the Commission recommends that Congress:

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1 The views expressed in this statement represent the views of the Commission. My oral presentation and responses to any questions are my own, however, and do not necessarily reflect the views of the Commission or any other Commissioner.

- Permit the FTC to employ notice and comment rulemaking procedures to establish rules pursuant to the FTC Act that set forth unfair or deceptive acts and practices relating to all financial services.

- Authorize the FTC to obtain civil penalties for unfair or deceptive acts and practices relating to all financial services and authorize the FTC to bring suit in its own right in federal court to obtain civil penalties.

- Provide additional resources to assist the FTC in increasing its law enforcement activities related to financial services and expanding its critical research on the efficacy of mortgage disclosures and other topics.

- Ensure that, because of the Commission's unequaled and comprehensive focus on consumer protection, its independence from providers of financial services, and its emphasis on vigorous law enforcement, the FTC is considered as it moves forward in determining how to modify federal oversight of consumer financial services.

This testimony will provide an overview of the FTC's consumer protection authority related to financial services, describe how the Commission has used its consumer protection tools on behalf of consumers throughout the credit life-cycle, and recommend changes in the law to enable the FTC to do more to protect consumers. To be effective in doing more to protect consumers, the Commission will need more resources.

II. Overview of FTC Authority

Although many federal agencies have authority over financial services, the FTC is the only federal agency whose sole objective with respect to financial services is to protect consumers. The Commission has law enforcement authority over a wide range of acts and practices related to financial services. The agency enforces Section 5 of the Federal Trade

Commission Act,[2] which prohibits unfair or deceptive acts or practices in or affecting commerce The FTC also has the authority to promulgate rules to prohibit deceptive or unfair practices.[3]

The Commission also enforces a number of other consumer protection statutes that govern financial services providers, including the Truth in Lending Act ("TILA"),[4] the Home Ownership and Equity Protection Act ("HOEPA"),[5] the Consumer Leasing Act ("CLA"),[6] the Fair Debt Collection Practices Act ("FDCPA"),[7] the Fair Credit Reporting Act ("FCRA"),[8] the

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[2] 15 U.S.C. § 45(a).

[3] 15 U.S.C. § 57a(a)(1)(B); rulemaking procedures are set forth at 15 U.S.C. § 57a(b). The Commission has used this authority to issue two rules to prevent and prohibit unfair practices concerning consumer credit: the Holder in Due Course Rule, 40 Fed. Reg. 53,506 (Nov. 18, 1975) (codified at 16 C.F.R. § 433), and the Credit Practices Rule, 49 Fed. Reg. 7740 (March 1, 1984) (codified at 16 C.F.R. § 444).

[4] 15 U.S.C. §§ 1601-1666j (requiring disclosures and establishing other requirements in connection with consumer credit transactions).

[5] 15 U.S.C. § 1639 (providing additional protections for consumers who enter into certain high-cost refinance mortgage loans). HOEPA is a part of TILA.

[6] 15 U.S.C. §§ 1667-1667f (requiring disclosures, limiting balloon payments, and regulating advertising in connection with consumer lease transactions).

[7] 15 U.S.C. §§ 1692-1692p (prohibiting abusive, deceptive, and unfair debt collection practices by third-party debt collectors).

[8] 15 U.S.C. §§ 1681-1681x (imposing standards for consumer reporting agencies and information furnishers in connection with the credit reporting system and placing restrictions on the use of credit reporting information).

Equal Credit Opportunity Act ("ECOA"),[9] the Credit Repair Organizations Act ("CROA"),[10] the Electronic Funds Transfer Act ("EFTA"),[11] and the privacy provisions of the Gramm-Leach-Bliley Act ("GLB Act").[12]

Under the TILA, CLA, ECOA, and EFTA, the Federal Reserve Board ("Federal Reserve"), not the FTC, has the authority to promulgate implementing rules that the FTC enforces for entities within its jurisdiction. Under the GLB Act and the FCRA (including the FACT Act),[13] the FTC has limited authority to promulgate and enforce implementing regulations.[14]

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9 15 U.S.C. §§ 1691-1691f (prohibiting creditor practices that discriminate on the basis of race, religion, national origin, sex, marital status, age, receipt of public assistance, and the exercise of certain legal rights).

10 15 U.S.C. §§ 1679-1679j (requiring disclosures and establishing other requirements in connection with credit repair organizations, including prohibiting charging fees until services are completed)

11 15 U.S.C. §§ 1693-1693r (establishing basic rights and responsibilities of institutions and consumers in connection with electronic fund transfer services).

12 15 U.S.C. §§ 6801-6809 (imposing requirements on financial institutions with respect to annual privacy notices, procedures for providing customers an opt-out from having certain information shared with nonaffiliated third parties, and safeguarding customers' personally identifiable information).

13 Pub. L. No. 108-159, 117 Stat. 1953 (2003).

14 For a description of the FTC's activities related to the GLB Act, FCRA, and FACT Act, and the protection of the privacy and security of consumer's financial information, *see* Prepared Statement of the Federal Trade Commission on Protecting the Privacy of the Social Security Number From Identity Theft before the Subcommittee On Social Security of the Committee On Ways and Means, United States House of Representatives (June 21, 2007), *available at* http://www.ftc.gov/os/testimony/P065409socsectest.pdf; Prepared Statement of the Federal Trade Commission on Credit Reports: Consumers' Ability To Dispute And Change Inaccurate Information before the Committee On Financial Services of the United States House of Representatives (June 19, 2007), *available at*

Although the Commission has broad authority related to financial products and services, many financial service providers are exempt from the FTC's jurisdiction. Banks, thrifts, and federal credit unions are specifically exempt from the Commission's jurisdiction.[15] The FTC's jurisdiction reaches only to non-bank financial companies, including non-bank mortgage companies, mortgage brokers, and finance companies. Similarly, under the FDCPA and CROA, the Commission has jurisdiction over non-bank entities, including debt collectors and credit repair organizations, respectively.[16]

III. Existing Role: FTC's Protection of Consumers During the Credit Life-Cycle

As a law enforcement agency, the FTC brings significant cases, cooperates with other law enforcers, and facilitates industry initiatives with a law enforcement component. In addition to law enforcement, the Commission uses consumer and business education, as well as research and policy development, to protect consumers of financial services. This section discusses the FTC's activities in the various stages of the consumer credit life-cycle.

A. Consumers Seeking Credit

1. Advertising and Marketing

The credit life-cycle begins when a consumer initially shops for a mortgage, credit card, auto loan, payday loan, or any other form of credit. The FTC has brought numerous enforcement actions challenging deceptive or illegal marketing by lenders, brokers, or other advertisers of

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http://www.ftc.gov/os/2007/06/070619credittestimony.pdf.

15 *See* 15 U.S.C. § 45(a)(2).

16 *See* 15 U.S.C. § 1692a(4), (6); 15 U.S.C. § 1679b(4).

consumer credit in violation of the FTC Act or the TILA.[17]

In mortgage advertising, the Commission has brought actions against mortgage lenders or brokers for deceptive marketing of loan costs[18] or other key loan terms, such as the existence of a prepayment penalty[19] or a large balloon payment due at the end of the loan.[20] Most recently, the Commission announced settlements with three mortgage lenders charged with advertising low interest rates and low monthly payments, but allegedly failing to adequately disclose that the low rates and payment amounts would increase substantially after a limited period of time.[21]

As to credit cards, the Commission has jurisdiction over very few entities that issue credit cards. Banks, savings associations, and credit unions issue the vast majority of credit cards, with national banks alone being responsible for approximately 75% of credit cards issued.[22] The FTC,

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17 *See, e.g., FTC v. Mortgages Para Hispanos.Com Corp.*, No. 06-00019 (E.D. Tex. 2006); *FTC v. Ranney*, No. 04-1065 (D. Colo. 2004); *FTC v. Chase Fin. Funding*, No. 04-549 (C.D. Cal. 2004); *FTC v. Diamond*, No. 02-5078 (N.D. Ill. 2002); *United States v. Mercantile Mortgage Co.*, No. 02-5079 (N.D. Ill. 2002); *FTC v. Associates First Capital Corp.*, No. 01-00606 (N.D. Ga. 2001); *FTC v. First Alliance Mortgage Co.*, No. 00-964 (C.D. Cal. 2000).

18 *See, e.g., FTC v. Associates First Capital* Corp., No. 01-00606 (N.D. Ga. 2001); *FTC v. First Alliance Mortgage Co.*, No. 00-964 (C.D. Cal. 2000).

19 *FTC v. Chase Fin. Funding*, No. 04-549 (C.D. Cal. 2004); *FTC v. Diamond*, No. 02-5078 (N.D. Ill. 2002).

20 *FTC v. Diamond*, No. 02-5078 (N.D. Ill. 2002).

21 *See, e.g, In the Matter of American Nationwide Mortgage Company, Inc.*, FTC Dkt. No. C-4249 (Feb.17, 2009); *In the Matter of Shiva Venture Group, Inc.*, FTC Dkt. No. C-4250 (Feb. 17, 2009); *In the Matter of Michael Gendrolis*, FTC Dkt. No. C-4248 (Feb. 17, 2009).

22 *See* Testimony of Julie L. Williams, Chief Counsel and First Senior Deputy Comptroller, Office of the Comptroller of the Currency, Before the Subcommittee on Financial Institutions and Consumer Credit of the Committee on Financial Services of the U.S. House of Representatives (Apr. 17, 2008) at 1, *available at*

however, has brought enforcement actions against credit card marketers and advertisers that fall under its jurisdiction. In June 2008, the FTC sued a credit card marketing company, CompuCredit Corporation, for allegedly deceptively marketing its credit cards to subprime consumers nationwide,[23] primarily through solicitations that misrepresented the amount of available credit and failed to adequately disclose the cost of that credit.[24] Last December, CompuCredit agreed to settle this case for an estimated $114 million in credits as redress to consumers.[25]

Payday loans are another source of consumer credit, and the Commission has taken action to protect consumers from the illegal conduct of payday lenders. Specifically, the FTC has challenged companies for failing to disclose the Annual Percentage Rates ("APR") for payday loans, which failure makes it harder for consumers to comparison shop for credit. For example, in the last year, the Commission has brought actions against three payday lenders[26] and two

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http://www.occ.treas.gov/ftp/release/2008-45b.pdf.

[23] Although the credit cards were issued by various FDIC-regulated banks, CompuCredit created, designed, and distributed the credit card marketing materials that the Commission alleged were deceptive. The Commission worked closely on this case with the FDIC, which brought a parallel action challenging this deceptive conduct.

[24] *FTC v. CompuCredit Corp. and Jefferson Capital Systems, LLC*, No. 1:08-CV-1976-BBM-RGV (N.D. Ga. 2008).

[25] *See* Press Release, Federal Trade Commission, Subprime Credit Card Marketer to Provide At Least $114 Million in Consumer Redress to Settle FTC Charges of Deceptive Conduct (Dec. 19, 2008), *available at* http://www2.ftc.gov/opa/2008/12/compucredit.shtm.

[26] *In the Matter of CashPro*, Docket No. C-4220 (Fed. Trade Comm'n June 6, 2008) (final consent order); *In the Matter of American Cash Market, Inc.*, Docket No. C-4221 (Fed. Trade Comm'n June 6, 2008) (final consent order); *In the Matter of Anderson Payday Loans*, Docket No. C-4222 (Fed. Trade Comm'n June 6, 2008) (final consent order), *available at*

payday loan lead generators.[27]

Similarly, the FTC has taken enforcement actions against payday loan lenders under the FTC Act, the TILA, and Regulation Z.[28] For example, in November 2008, the FTC and the State of Nevada charged ten related Internet payday lenders and their principals, based mainly in the United Kingdom, with violations of federal and state law.[29] The complaint alleged that the defendants called applicants in the United States and told them that they qualified for a loan, typically in an amount around $200, that would have to be repaid by their next payday, with a fee ranging from $35 to $80. The defendants purportedly told consumers that they would receive written disclosures about the loans following the call, but consumers never received them. In addition, the complaint alleged that they failed to disclose in writing to consumers key terms of their loans, including the APR, the payment schedule, the amount financed, the total number of payments, and any late payment fees. This litigation is ongoing.

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http://www.ftc.gov/opa/2008/02/amercash.shtm.

[27] *In the Matter of We Give Loans, Inc.*, Docket No. C-4232 (Sept. 5, 2008) (final consent order); *In the Matter of Aliyah Associates, LLC d/b/a American Advance*, Docket No. C-4229 (Sept. 5, 2008) (final consent order), *available at* http://www.ftc.gov/opa/2008/06/wegiveloans.shtm.

[28] The FTC also challenges similar practices in non-payday loan financing cases. For example, the Commission settled charges that BlueHippo Funding, LLC violated, among other things, the FTC Act and the TILA in advertising and offering financing of high-end electronics to consumers with poor credit. *FTC v. BlueHippo Funding, LLC*, No. 1:08-cv-1819 (S.D.N.Y. Apr. 10, 2008) (stipulated permanent injunction entered), *available at* http://www2.ftc.gov/opa/2008/02/bluehippo.shtm. The settlement agreement requires, among other things, that the defendants pay between $3.5 million and $5 million for consumer redress.

[29] *FTC and State of Nevada v. Cash Today, Ltd.*, No. 3:08-cv-00590 (D. Nev. Nov. 6, 2008) (complaint filed), *available at* http://www1.ftc.gov/opa/2008/11/cashtoday.shtm.

Finally, as discussed in our recent testimony before this Subcommittee,[30] the Commission has brought law enforcement actions[31] against deceptive advertising of car loans and deceptive lending under its Section 5 authority.[32] The FTC has challenged car manufacturers, dealerships, and advertising agencies that allegedly made bold claims of low costs or terms that omitted or buried key costs, or that misrepresented the terms available to consumers.[33]

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[30] Prepared Statement of the Federal Trade Commission on Consumer Protection In the Used and Subprime Car Market before the House Committee on Energy and Commerce, Subcommittee on Commerce, Trade and Consumer Protection (Mar. 5, 2009), *available at* http://www.ftc.gov/os/2009/03/P064808usedcarstestimony.pdf.

[31] In addition to its enforcement work, the Commission creates and distributes consumer education materials to inform consumers about what information to gather when shopping for a used car or for loans on cars and what steps to take to protect themselves regarding debt, including guidance on auto repossessions. *See* Federal Trade Commission, Hurricane Recovery: Automobiles, *available at* http://www.ftc.gov/bcp/edu/microsites/recovery/hurricane/consumer_info.html#auto; Federal Trade Commission, Buying a Used Car (June 2008), *available at* http://www.ftc.gov/bcp/edu/pubs/consumer/autos/aut03.pdf; Federal Trade Commission, Understanding Vehicle Financing (March 2007), *available at* http://www.ftc.gov/bcp/edu/pubs/consumer/autos/aut04.pdf. Numerous consumer education publications for consumers are posted on the FTC website on a page labeled "In Debt" and are available in print from a variety of sources. *See* http://www.ftc.gov/bcp/menus/consumer/credit/debt.shtm. *See also* Federal Trade Commission, Vehicle Repossession: Understanding the Rules of the Road (Nov. 2008), *available at* http://www.ftc.gov/bcp/edu/pubs/consumer/autos/aut14.pdf.

[32] The Commission brought 29 cases challenging deception in the advertising of finance or lease terms for cars between 1990 and 2000. *See* Prepared Statement, *supra* note 30. These cases were resolved by consent agreements.

[33] The Commission has also obtained civil penalties for violations of certain lease or credit advertising orders. *See United States v. Mazda Motor of America, Inc.*, No. SACV- 99-1213 AHS (C.D. Cal. Oct. 7, 1999) (consent decree); *United States v. Suntrup Buick-Pontiac-GMC Truck, Inc.*, No. 4:99CV01746CEJ (E.D. Mo. Nov. 22, 1999) (consent decree).

2. Fair Lending

Another significant focus of FTC law enforcement in the mortgage lending area is discrimination.[34] Since the Equal Credit Opportunity Act was enacted, the Commission has brought over three dozen cases alleging that large subprime lenders, major nonmortgage creditors, and smaller finance companies violated that statute.[35] The FTC has challenged the failure to comply with the ECOA's adverse action notice requirement. The Commission also has challenged the failure to comply with record-keeping requirements that help law enforcers determine whether creditors have complied with the law and to take law enforcement action against those who have not.[36]

Most of the FTC's lending discrimination cases in the past have involved the unlawful denial of credit, but recently the FTC's enforcement has focused on discrimination in the pricing

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[34] *See* Prepared Statement of the Federal Trade Commission on Home Mortgage Disclosure Act Data and FTC Lending Enforcement before House Committee on Financial Services, Subcommittee on Oversight and Investigations (July 25, 2007), *available at* http://www.ftc.gov/os/testimony/P064806hdma.pdf. Additionally, for more than a decade, the FTC has been a member of the Interagency Task Force on Fair Lending, a joint undertaking with DOJ, HUD, and the federal banking regulatory agencies. For additional details, see *id.* at 3-4.

[35] Pursuant to ECOA, a violation of ECOA is deemed to be a violation of the FTC Act, and the FTC is authorized to enforce compliance with ECOA as if it were a violation of an FTC Trade Regulation Rule. 15 U.S.C. § 1691c(c) (violations of a trade regulation rule are subject to civil penalties of up to $16,000 per violation). The FTC Act does not authorize the FTC to collect civil penalties in its own right. Thus, where the Commission seeks civil penalties for alleged ECOA violations, it refers the case to the DOJ, and if DOJ declines to litigate the matter, the FTC may then file an action to obtain civil penalties. In cases where the Commission seeks equitable relief and does not seek civil penalties, it files the case by its own attorneys in federal district court. *See generally*, 15 U.S.C. § 56(a).

[36] For a list of cases, please see Prepared Statement, supra note 34, at 9-11.

of mortgage loans. In December 2008, the FTC reached a settlement with Gateway Funding Diversified Mortgage Services, L.P., and its general partner, Gateway Funding Inc. ("Gateway"). The Commission alleged that Gateway violated the ECOA by charging African-American and Hispanic consumers higher prices for mortgage loans than non-Hispanic white consumers. The settlement bars Gateway from discriminatory lending practices and requires it to implement a fair lending training program, a comprehensive data integrity program designed to ensure accuracy and completeness of loan data, and a fair lending monitoring program that includes a system for performing periodic analyses to monitor for disparities in loan prices. The settlement imposed a judgment of $2.9 million, all but $200,000 of which was suspended based on inability to pay. The FTC is using this money to redress African-American and Hispanic consumers who were harmed by Gateway's practices.[37]

B. Consumers Repaying on Debts - Mortgage Servicing

In the mortgage market, servicers collect payments for lenders and other owners of loans. The FTC has challenged deceptive and unfair practices in the servicing of mortgage loans, addressing core issues such as failing to post payments upon receipt, charging unauthorized fees, and engaging in deceptive or abusive collection tactics. For example, in September 2008, the

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[37] The FTC also investigated Homecomings Financial, LLC ("Homecomings"), a wholesale mortgage lender that originated the vast majority of its loans through independent brokers. The FTC staff's analyses showed that, on average, Homecomings charged African-American and Hispanic borrowers substantially more than similarly-situated non-Hispanic whites, and the price differences could not be explained by any legitimate underwriting or credit characteristics. The FTC staff closed its investigation in January 2009 because Homecomings ceased originating mortgage loans and stated it has no intention of resuming mortgage lending. *See* http://www.ftc.gov/os/closings/090122homecomingfinancialclosingletter.pdf.

FTC settled charges that EMC Mortgage Corporation and its parent, The Bear Stearns Companies, LLC, violated Section 5 of the FTC Act and the FDCPA, among other laws, in servicing consumers' mortgage loans, including debts that were in default when EMC obtained them.[38] The EMC settlement required the defendants to pay $28 million in consumer redress, and the Commission has sent checks to over 86,000 consumers. The settlement also barred the defendants from future law violations, and imposed new restrictions on their business practices. In particular, it required EMC to establish and maintain a comprehensive data integrity program to ensure the accuracy and completeness of data and other information about consumers' loan accounts before servicing those accounts.

With the downturn in the economy and the increased number of consumers in financial distress, the FTC has increased its efforts to provide mortgage borrowers with tools to protect themselves. For example, the FTC distributes consumer education materials on mortgage servicing, what consumers should do if they are having trouble making mortgage payments, and how consumers can manage their mortgage if their lender closes or files for bankruptcy.[39] The

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[38] *FTC v. EMC Mortgage Corp.*, No. 4:08-cv-338 (E.D. Tex. Sept. 9, 2008). *See* Press Release, Federal Trade Commission, Bear Stearns and EMC Mortgage to Pay $28 Million to Settle FTC Charges of Unlawful Mortgage Servicing and Debt Collection Practices (Sept. 9, 2008), *available at* http://www2.ftc.gov/opa/2008/09/emc.shtm. Among other practices, the complaint alleged that the defendants: (1) misrepresented the amounts consumers owed; (2) assessed and collected unauthorized fees; and (3) misrepresented that they had a reasonable basis to substantiate their representations about consumers' mortgage loan debts. The complaint further alleged the defendants made harassing collection calls; falsely represented the character, amount, or legal status of consumers' debts; and used false representations and deceptive means to collect on mortgage loans.

[39] *See* http://www.ftc.gov/bcp/edu/pubs/consumer/homes/rea10.shtm; http://www.ftc.gov/bcp/edu/pubs/consumer/homes/rea04.shtm;

Commission also uses innovative approaches to reach out to consumers in other ways. This January, the FTC included a bookmark, "Numbers to Know & Places to Go," with contacts for more information about assistance with financial services, along with the redress checks it distributed as part of the agency's settlement with EMC.

C. Consumers in Financial Distress

The final stage of the consumer credit life-cycle occurs when consumers are in debt and struggling to make payments. With the recent downturn in the economy, more consumers find themselves in such difficult financial circumstances. The Commission has an active program to protect consumers in financial distress.

1. Debt Collection

The Commission is the primary governmental enforcer of the FDCPA. The FDCPA prohibits third party debt collectors from engaging in abusive, deceptive, and unfair debt collection practices. Section 5 of the FTC Act also prohibits creditors from engaging in unfair or deceptive acts and practices in collecting their own debts. The FTC receives more complaints about debt collection than any other industry.[40] The consumer complaints describe demands for payments that are not owed or larger than owed, harassment, false threats of legal or other action, impermissible calls to the consumer's place of employment, revealing debts to third parties, and

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http://www.ftc.gov/bcp/edu/pubs/consumer/homes/rea12.shtm.

[40] *See* FEDERAL TRADE COMMISSION ANNUAL REPORT 2009: FAIR DEBT COLLECTION PRACTICES ACT at 4, *available at* http://www.ftc.gov/os/2009/02/P094804fdcpareport.pdf.

other law violations.

Since 1999, the FTC has brought 21 lawsuits for illegal debt collection practices. In these cases, the Commission has obtained strong permanent injunctive and equitable relief, including substantial monetary judgments and bans on some defendants collecting debts.[41] In addition, the FTC has held more individuals who control the companies' practices, rather than just companies, liable for unlawful debt collection practices. For example, in November 2008, Academy Collection Service, Inc., and its owner, Keith Dickstein, agreed to pay $2.25 million in civil penalties to settle charges that they violated the FDCPA and Section 5 of the FTC Act.[42] This is the largest civil penalty that the Commission has ever obtained in an FDCPA case.

2. Mortgage Loan Modification and Foreclosure Rescue Scams

With the rapid increase in mortgage delinquencies and foreclosures, the FTC has intensified its efforts to protect consumers from mortgage loan modification and foreclosure rescue scams.[43] In a little over a year, the Commission has brought eight cases targeting

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[41] *See, e.g., FTC v. Check Investors, Inc.*, 2005 U.S. Dist. LEXIS 37199 (D.N.J. July 18, 2005) (ban on debt collection and $10.2 million judgment), *aff'd*, 503 F.3d 159 (3d Cir. 2007), *petition for reh'g denied*, Nos. 05-3558, 05-3957 (3d Cir. Feb. 6, 2008).

[42] *United States v. Acad. Collection Serv., Inc.*, No. 2:08-CV-1576 (D. Nev. Nov. 18, 2008). *See* Press Release, Federal Trade Commission, Nationwide Debt Collector Will Pay $2.25 Million to Settle FTC Charges (Nov. 21, 2008), *available at* http://www.ftc.gov/opa/2008/11/academy.shtm.

[43] On February 13, 2008, the FTC testified before the Senate Special Committee on Aging about foreclosure rescue fraud. A more comprehensive statement of the Commission's efforts to combat foreclosure rescue fraud is set forth in the FTC's testimony for that hearing, *available at* http://www.ftc.gov/os/testimony/P064814foreclosure.pdf.

mortgage foreclosure rescue scams, including two cases the FTC is announcing today.[44] In the cases announced today, the Commission alleges that the defendants misrepresented to delinquent borrowers that they would obtain mortgage loan modifications and prevent foreclosure and that, if unsuccessful, they would provide refunds to consumers. In addition, the defendants allegedly misrepresented that they were part of the legitimate Hope Now Alliance of housing counselors and mortgage servicers - using similar sounding names and representing to consumers that they were part of the Alliance. The court issued temporary restraining orders enjoining the deceptive practices and imposing an asset freeze pending a preliminary injunction hearing. In other cases, the Commission alleged that the defendants promise to stop foreclosure in exchange for an up-front consumer payment, ranging from $500 to $1,200. After a consumer makes the payment, the defendants allegedly do little or nothing to stop the foreclosure. Such a fraud not only tricks consumers out of funds desperately needed for expenses but may also lead them to forgo realistic options to avoid foreclosure, such as getting help from a non-profit housing counselor.

In tandem with its law enforcement actions, the Commission recently has initiated a stepped-up outreach initiative on mortgage loan modification and foreclosure rescue fraud. The FTC is involved in federal, state, and local task forces in several regions where foreclosures are

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[44] *FTC v. Hope Now Modifications*, No. 1:09-cv-01204-JBS-JS (D.N.J. filed March 17, 2009); *FTC v. New Hope Property LLC*, No. 1:09-cv-01203-JBS-JS (D.N.J. filed March 17, 2009); *FTC v. National Foreclosure Relief, Inc.*, No. SACV09-117 (C.D. Cal. Feb. 2, 2009); *FTC v. United Home Savers, LLP*, No. 8:08-cv-01735-VMC-TBM (M.D. Fla. Sept. 3, 2008); *FTC v. Foreclosure Solutions, LLC, and Timothy A. Buckley*, No. 1:08-cv-01075 (N.D. Ohio April 28, 2008); *FTC v. Mortgage Foreclosure Solutions, Inc.*, No. 8:08-cv-388-T-23EAJ (M.D. Fla. Feb. 26, 2008); *FTC v. National Hometeam Solutions, Inc.*, No. 4:08-cv-067 (E.D. Tex. Feb. 26, 2008); *FTC v. Safe Harbour Foundation*, No. 08 C 1185 (N.D. Ill. Feb. 25, 2008).

most prevalent both to coordinate enforcement and develop consumer outreach strategies. In addition, to warn consumers about the red flags for scams and inform them about the legitimate resources available to them, the Commission has undertaken a variety of other outreach initiatives. The FTC submitted a series of radio public service announcements, in English and Spanish, to stations in cities hardest hit by mortgage foreclosures. The Commission also distributed an article adapted from its mortgage foreclosure scam consumer education brochure to a national syndicated news service, which in turn, sent it to more than 10,000 community newspapers across the nation for inclusion in their publications.

3. Debt Settlement

With historically high levels of consumer credit card debt, many consumers are looking for ways to manage or reduce their debt. For decades, credit card debt relief was almost exclusively the province of non-profit credit counseling agencies ("CCAs"). Beginning in the mid-1960s, creditor banks initiated the current model of non-profit credit counseling to reduce personal bankruptcy filings. Under this model, CCAs work with consumers and creditors to negotiate a repayment plan of primarily credit card debt (a "debt management plan" or "DMP") and also assist the consumer in developing a manageable budget and educational tools to avoid debt problems in the future. If the consumer cannot afford a repayment plan, the credit counselor explores other options, including referral to a bankruptcy attorney.

The historic levels of consumer debt necessarily have affected the services CCAs can provide.[45] The increased demand for debt relief options resulted in the recent growth of *for-profit* debt settlement companies. The term "debt settlement" refers to services for-profit companies market promising to obtain lump sum settlements of consumers' unsecured debt – primarily, credit card debt. These companies typically promise that they will negotiate with creditors to obtain settlements in amounts less than the full balance owed by the consumer. The for-profit debt settlement business model typically encourages consumers, even those who are current on their payments, to not pay their credit card debt to encourage creditors to accept less than full payment of principal as a form of loss mitigation. Unlike CCAs, debt settlement companies do not consolidate credit card debt or arrange a monthly payment plan to pay off the debt over a period of years. Rather, the goal of debt settlement is to save enough cash, while not paying creditors, so that the creditors will offer to take a fraction of the balance owed as settlement in lieu of the full debt.

Since 2001, the Commission has brought 14 cases against both sham non-profit CCAs and for-profit debt settlement companies.[46] In these cases, defendants allegedly deceive consumers who are seeking workout options for credit card debt into paying large upfront fees for debt relief services which are never provided. Other claims made by these entities include

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[45] *See* Federal Trade Commission, Debt Settlement Workshop (Sept. 25, 2008), Transcript at 6 (remarks of Lydia B. Parnes, then-Director of the Bureau of Consumer Protection), *available at* http://www.ftc.gov/bcp/workshops/debt settlement/OfficialTranscript.pdf.

[46] For a list of cases, see Prepared Statement of the Federal Trade Commission on Consumer Protection and the Credit Crisis before the Senate Committee on Commerce, Science, and Transportation (Feb. 26, 2009), *available at* http://www.ftc.gov/os/2009/02/P084800creditcrisis.pdf.

allegedly deceptive promises that debt collectors will stop trying to collect from consumers enrolled in their programs and that stopping payments to creditors under their programs will not hurt consumers' creditworthiness.

In early February 2009, the Commission brought a contempt action against an alleged sham non-profit credit counseling company and its principal for violations of a 2008 federal court order.[47] The defendants, Express Consolidation and Randall Leshin, misrepresented their non-profit status, charged hidden fees, and misled consumers about the benefits of enrolling in a debt management plan, according to the Commission's underlying action.[48] The 2008 order prohibited them from continuing to engage in their illegal conduct and from operating in states where they were not qualified to do business. Nevertheless, the defendants continued to do business in states where they were unqualified and to collect fees from consumers who had cancelled their debt management plans. On February 17, 2009, the court found the defendants in contempt based on this conduct. The Commission currently is seeking an order reimbursing consumers for any fees collected in violation of the 2008 order.

4. Credit Repair

Another consumer protection challenge exacerbated by the economic downturn is the effect of delinquencies, bankruptcy, or other negative credit information on consumers' credit reports. Fraudulent credit repair companies falsely promise to be able to remove for a fee

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47 *FTC v. Randall L. Leshin d/b/a Express Consolidation*, No. 0:06-CV-61851-WJZ (S.D. Fla. 2008).

48 *FTC v. Express Consolidation*, No. 06-CV-61851 (S.D. Fla. Dec.11, 2006).

accurate, negative information from consumers' credit reports. This false promise may particularly appeal to consumers with poor credit histories who are seeking a job, a car loan, or a mortgage.

The Commission has acted aggressively against such "credit repair" scams. Since 1999, the FTC has brought 42 cases against defendants that allegedly misrepresented the credit-related services they would provide. Most recently, in October 2008, the Commission and 24 state agencies announced a crackdown on 33 credit repair operations – entities that deceptively claimed they could remove negative information from consumers' credit reports, even if that information was accurate and timely.[49] The law enforcement sweep included ten FTC actions charging companies with violating the FTC Act and the CROA by making false and misleading statements, such as claiming they could substantially improve consumers' credit reports by removing accurate, negative information from credit reports. The agency also alleged that the defendants violated the CROA by charging an advance fee for credit repair services. The sweep included 26 state actions alleging violations of state laws and the CROA. Our partnerships with state authorities have increased significantly the reach of the Commission's law enforcement efforts to promote broader compliance with the law.

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[49] *See* Press Release, FTC's Operation "Clean Sweep" Targets "Credit Repair" Companies, *available at* http://www.ftc.gov/opa/2008/10/cleansweep.shtm.

IV. Future Role: Enhancing FTC Consumer Protection Efforts

A. FTC's Ongoing Evolution to Protect Consumers More Effectively

The Commission is evolving to provide enhanced protection for consumers of financial products and services. The FTC recognizes that consumers need more help as soon as possible, especially those who are heavily in debt and in financial distress. The Commission therefore intends to move expeditiously to use newly granted authority to issue rules concerning mortgage loans and to use all of its traditional tools – law enforcement, consumer education, and research and policy development – to protect consumers better.

1. Issuing New Rules

One challenge that the FTC has confronted in using rulemaking to address consumer protection problems, including those related to financial services, has been the procedural requirements that the FTC Act imposes on such rulemakings. The FTC has been required to use the burdensome and time-consuming procedures of Section 18 of the FTC Act ("Magnuson-Moss procedures") to promulgate such rules.[50] FTC rulemakings pursuant to Magnuson-Moss procedures typically have required from three to ten years to complete.[51]

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[50] Section 18, for example, includes requirements that the FTC must publish an advance notice of proposed rulemaking and seek public comment before publishing its notice of proposed rulemaking; it must provide an opportunity for a hearing before a presiding officer at which interested persons are accorded certain cross-examination rights; and, where there are numerous interested parties, the FTC must determine which have similar interests, have each group of persons with similar interests choose a representative, and make further determinations about representation for those interests in the cross-examination process. 15 U.S.C. § 57a(b).

[51] For example, the proceeding to promulgate the FTC's Credit Practices Rule, 16 C.F.R. Part 444, using Magnuson-Moss procedures took almost ten years. In contrast, the proceeding to promulgate the FTC's Telemarketing Sales Rule, 16 C.F.R. Part 310, using APA

The 2009 Omnibus Appropriations Act enacted earlier this month directed the Commission to commence within ninety days a rulemaking proceeding to prohibit unfair and deceptive acts and practices with respect to mortgage loans.[52] This new legislation allows the FTC to use the relatively streamlined notice and comment rulemaking procedures under Section 553 of the Administrative Procedure Act ("APA")[53] in promulgating these rules,[54] rather than Magnuson-Moss procedures. The Commission anticipates that its rulemaking will address mortgage servicing practices and scams involving mortgage loan modification and foreclosure rescue, as well as other mortgage lending issues. As Congress clearly intended when it passed this legislation, any rules that the agency issues would cover only entities that are within the FTC's jurisdiction.[55] In other words, any such rules would not cover the acts and practices of banks, thrifts, and federal credit unions. The Commission appreciates this new authority and believes that it will be instrumental in increasing the protection that the agency can provide to mortgage borrowers.

The FTC also believes that it could do more to assist consumers if it could use APA notice and comment procedures to promulgate rules for those entities under the Commission's jurisdiction for unfair and deceptive acts and practices related to financial services other than

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procedures took one year.

52 *See* Omnibus Appropriations Act, 2009, Pub. L. 111-8, __ Stat. __ § 626 (2009 Omnibus Appropriations Act). H.R. 1105 was signed by President Obama on Mar. 11, 2009.

53 5 U.S.C. § 553.

54 Section 626(a) of the 2009 Omnibus Appropriations Act.

55 155 Cong. Rec. 52816-52817 (2009).

mortgage loans. The Commission therefore recommends that Congress amend the law to allow the FTC to use APA notice and comment rulemaking procedures to curb unfair acts and practices related to financial services. Doing so would ensure that FTC rulemaking for financial services is consistent with the procedures permitted under recent legislation for mortgage loans and consistent with the rulemaking procedures that most federal agencies use.[56]

2. Tough Enforcement of Existing and New Laws

As an agency with broad jurisdiction, the Commission has the flexibility to focus its law enforcement efforts and shift its resources to combat the most pressing problems that consumers confront. Given the current state of the economy and consumers' financial situation, the FTC has increased its emphasis on protecting consumers who are delinquent or in default on their debts from unlawful acts and practices. The FTC's future law enforcement efforts will continue to focus on protecting consumers in financial distress from illegal harmful practices.

In addition to its new authority to issue and enforce new mortgage rules pursuant to the 2009 Omnibus Appropriations Act, the FTC will soon be able to enforce new mortgage rules that the Federal Reserve Board issued last year. In July 2008, the Federal Reserve Board issued final rules pursuant to TILA and HOEPA that prohibit a variety of unfair, deceptive, and abusive

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[56] For example, *under the FTC Act itself*, the Federal Reserve Board, the Office of Thrift Supervision, and the National Credit Union Administration may use APA notice and comment rulemaking to promulgate such rules for banks, thrifts, and federal credit unions, respectively. *See* 15 U.S.C. § 57a(f). The FTC, by contrast, must use the onerous and time-consuming Magnuson-Moss rulemaking procedures to address the exact same unfair and deceptive acts and practices by financial entities within the Commission's jurisdiction.

home mortgage advertising, lending, appraisal, and servicing practices.[57] As discussed above, the FTC has the authority to enforce rules implementing TILA and HOEPA for non-bank financial companies, such as nonbank mortgage companies, mortgage brokers, and finance companies. The 2009 Omnibus Appropriations Act enhanced the Commission's ability to enforce many of these new rules by providing that a violation of those rules generally shall be treated as a violation of an FTC trade regulation rule,[58] thus allowing the FTC to obtain civil penalties against those within the Commission's jurisdiction who violate these rules. Once the Federal Reserve Board's new TILA and HOEPA rules take effect in October 2009,[59] the Commission will actively enforce them.

Although the Commission's new authority under the 2009 Omnibus Appropriations Act will enhance FTC law enforcement, the FTC believes that it could be even more effective if the law were changed to permit the agency to obtain civil penalties for all unfair and deceptive acts and practices related to financial products and services and to bring suit in federal court in its own right to obtain civil penalties. The FTC does not have the authority to seek civil penalties for violations of some of the laws that it enforces – most notably, the agency cannot obtain penalties against those who engage in unfair or deceptive acts and practices in violation of the

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[57] *See* Truth in Lending, Final Rule, 73 Fed. Reg. 44,522 (July 30, 2008), *available at* http://edocket.access.gpo.gov/2008/pdf/E8-16500.pdf.

[58] Section 626(c) of the 2009 Omnibus Appropriations Act.

[59] The exception is the escrow rule, which is effective on two phased-in dates in 2010.

FTC Act.[60] Equitable monetary remedies, such as redress and disgorgement, may not be appropriate or sufficient in certain cases, and the availability of civil penalties against the wrongdoers would likely achieve greater deterrence. Changing the law to permit the agency to obtain civil penalties for unfair or deceptive acts or practices related to financial services thus would increase deterrence of would-be violators and protect consumers more effectively.[61]

In addition, even if civil penalties are available, the FTC may not bring an action in federal court seeking penalties without first referring it to the Department of Justice (DOJ) to file on behalf of the Commission.[62] Changing the process that is required to obtain penalties where they are available would make FTC law enforcement more effective. Giving the FTC independent litigating authority when it seeks civil penalties would allow the Commission – the agency with the greatest expertise in enforcing the FTC Act – to litigate some of its own civil penalty cases, while retaining the option of referring appropriate matters to DOJ.[63] Conferring

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[60] Currently, the FTC may seek civil penalties against any entity that knowingly violates a trade regulation rule promulgated by the FTC or that violates an FTC cease and desist order. *See* 15 U.S.C. §§ 45(l) and (m)(1)(A). In addition, recognizing the importance of civil penalties, Congress has specifically authorized the FTC to seek civil penalties for violations of certain statutes, *e.g.*, the FDCPA.

[61] If the Commission brings an action in federal court to obtain injunctive relief, the agency should be able to obtain civil penalties in the same action.

[62] 15 U.S.C. § 56.

[63] Other independent federal agencies, such as the Securities and Exchange Commission and the Commodity Futures Trading Commission, are able to maximize the benefits of their own expertise by independently bringing administrative or judicial actions for civil penalties.

this authority on the Commission also would increase efficiency.[64] The Commission therefore believes that the FTC Act should be amended to expand the agency's independent litigating authority to allow the FTC to bring actions for civil penalties in federal court "in its own name by any of its attorneys," without mandating that DOJ have the option to litigate on the FTC's behalf, as is currently required.

3. Research and Policy Development

As is clear from recent experience, markets for financial services are complex and dynamic, changing in response to developments in the economy, technology, the law, and many other factors. To remain an effective protector of and advocate for consumers of financial services, the FTC recognizes that the government must continually increase its knowledge of changing practices, evaluate its efforts, and modify its approach as needed.

The Commission has made the development and testing of disclosures (especially mortgage disclosures) a key priority in its research relating to financial services. Current statutory and regulatory schemes related to financial services include a host of requirements mandating that information be disclosed to consumers. Some have questioned whether these disclosures provide consumers with the information they need to properly understand the

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[64] Currently, if DOJ declines to participate in the name of the United States or otherwise fails to act within 45 days on such a referral, the Commission may file the case in its own name. This process requires extra time and delay, even under the best of circumstances. Moreover, once DOJ accepts a referral, the FTC normally assigns one or more of its staff attorneys, at DOJ's request, to assist in litigating the case. Despite excellent relations and coordination, the use of personnel at two agencies inevitably creates delay and inefficiencies. This is particularly true in cases where the FTC is simply referring to DOJ a civil penalty settlement to be filed in federal court.

products they are purchasing, and suggested that current disclosure requirements are inadequate in light of the advent and expansion of new financial services, such as alternative mortgages.

The Commission has a long history of conducting empirical tests of the efficacy of disclosures in a wide variety of commercial contexts.[65] Most recently, in 2007, the FTC's Bureau of Economics published a seminal research report concluding that the current mortgage disclosure requirements do not work and that alternative disclosures should be considered and tested.[66] (A copy of the prototype mortgage disclosure document that the FTC staff tested is attached to this testimony). As policymakers assess the utility of disclosures for financial services, the FTC has an opportunity to play a pivotal role in the debate. The Commission has the experience needed to conduct reliable studies of disclosures and report the results of these

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[65] For example, the FTC staff released a study showing that broker compensation disclosures that the Department of Housing and Urban Development had proposed confused consumers, leading many of them to choose loans that were more expensive. *See* Federal Trade Commission, Bureau of Economics Staff Report, *The Effect of Mortgage Broker Compensation Disclosures on Consumers and Competition: A Controlled Experiment* (February 2004). Another example is seminal empirical research conducted by FTC staff on rent-to-own transactions, including evaluating consumer disclosure requirements. *See* Federal Trade Commission, Bureau of Economics Staff Report, *Survey of Rent-to-Own Customers* (April 2000).

[66] See Federal Trade Commission, Bureau of Economics Staff Report, *Improving Consumer Mortgage Disclosures: An Empirical Assessment of Current and Prototype Disclosure Forms* (June 2007), *available at* http://www.ftc.gov/os/2007/06/P025505mortgagedisclosurereport.pdf. In this empirical study, the FTC staff tested currently required mortgage cost disclosure documents, as well as developed and tested a prototype mortgage cost disclosure document. The FTC staff study concluded that the current document "failed to convey key mortgage costs to many consumers," while the prototype document "significantly improved consumer recognition of mortgage costs, demonstrating that better disclosures are feasible." *Id.* at ES-1 and ES-5. Following up on this research, in 2008 the FTC's Bureau of Economics convened a conference to evaluate how mortgage disclosures could be improved. *See* Federal Trade Commission, "May 15, 2008 Mortgage Disclosure Conference," *available at* http://www2.ftc.gov/opa/2008/05/mortgage.shtm.

studies to policymakers and the public. The FTC intends to focus more attention on and devote more resources to its vital empirical work on how to make disclosures effective so that the agency can foster the development of sound consumer protection policy.

In addition to conducting empirical research, the Commission engages in other policy development to identify and promote effective policies related to financial services. For example, in late 2007, the Commission hosted a two-day workshop, entitled "Collecting Consumer Debts: The Challenges of Change," to explore changes in the debt collection industry and examine their impact on consumers and businesses since the FDCPA was enacted in 1977. The FTC released its debt collection workshop report last month.[67] The Commission concluded that debt collection law needs reform and modernization to reflect changes in consumer debt, the debt collection industry, and technology. The Report discusses these changes and sets forth the modifications to the law the FTC believes are needed to provide better consumer protection without unduly burdening debt collection.

Among other changes, the Report recommends that Congress amend the FDCPA to allow the FTC to issue implementing rules. The Commission believes that granting the agency such rulemaking authority would help the debt collection regulatory scheme keep pace with changes in technology and industry practices that create a risk of harm to consumers. The FTC hopes that its Report is a catalyst for change in the debt collection regulatory system.

In addition, in September 2008, the Commission convened a public workshop to examine

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[67] Federal Trade Commission, "*Collecting Consumer Debts: The Challenges of Change, A Report by the Federal Trade Commission*," (Feb. 26, 2009).

the debt settlement industry, including the role of creditors, and the consumer protection issues that the for-profit business model raises. The Commission is considering what initiatives, in addition to continued aggressive enforcement, are needed to further protect consumers from deceptive and unfair practices by purported debt relief companies.

B. FTC's Future Role in Consumer Financial Services Regulation

The Commission recognizes that the government must do more to protect consumers of financial services. Several bills have been introduced and proposals offered under which there would be changes in federal oversight of financial services.[68] There are differences in these bills and proposals, and there are numerous challenging issues that would have to be resolved to implement these concepts.

As these discussions about consumer financial services regulation continue, the Commission urges this Committee and the Congress to consider how best to utilize the Commission's unparalleled expertise in consumer protection. For many decades, consumer protection has been the FTC's central mission. The Commission has extensive experience enforcing consumer credit laws and a wide variety of other consumer protection laws, including working successfully with state law enforcers and regulators. The FTC is recognized as a leader in developing and distributing consumer and business education materials on a wide range of

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[68] *See, e.g.*, Financial Product Safety Commission Act of 2009, S. 566, 111th Cong. (1st Sess. 2009); Consumer Credit Safety Commission Act of 2008, S. 3629, 110th Cong. (2d Sess. 2008); Consumer Credit Safety Commission Act of 2008, H.R. 7258, 110th Cong. (2d Sess. 2008); Cong. Oversight Panel, "Special Report on Regulatory Reform: Modernizing the American Financial Regulatory System: Recommendations for Improving Oversight, Protecting Consumers, and Ensuring Stability," (Jan. 2009), at 34; U.S. Department of the Treasury, "Blueprint for a Modernized Financial Regulatory Structure," (Mar. 2008).

financial services topics. The agency has conducted critical research and policy development in the financial services sector, including seminal research on mortgage and other disclosure issues. Because of its unequaled and comprehensive focus on consumer protection, its independence from providers of financial services, and its emphasis on vigorous law enforcement, we ask Congress to ensure that the FTC is considered as it moves forward in determining how to modify federal oversight of consumer financial services.

V. Conclusion

The Commission is committed to protecting consumers throughout the credit life-cycle, especially from the predatory practices that target the many American consumers who struggle with mortgage, credit card, and other debt. The agency has used its traditional consumer protection tools of law enforcement, broad-based research and policy development, and consumer and business outreach to provide important protections for consumers of financial services. However, the Commission must do more. To enable the FTC to perform a greater and more effective role protecting consumers, it recommends changes in the law and resources to enhance its authority to promulgate needed rules, prosecute cases against law violators, and conduct critical research. If given more authority, the Commission certainly will use it to protect consumers.

The Commission appreciates the opportunity to appear before you today to discuss the FTC's work and your consideration of its views on moving forward. We look forward to working with the Committee and this Subcommittee on these critical issues.

Mr. RUSH. The chair thanks the chairman. The chair recognizes himself for 5 minutes for the purposes of questioning our witness. Chairman Leibowitz, during the housing boom the FTC had clear jurisdiction over many of the worse predatory lenders with the most objectionable practices, but the Commission arguably didn't do much to address any of these activities. As a matter of fact, it was the states that successfully brought actions against lenders such as Countrywide and AmeriQuest when there are abusive lending practices in the sub-prime mortgage market. In the second panel Attorney Jim Tierney will talk about these and other issues a little more.

But to begin with, I want to ask a simple question to you. What happened at the FTC? Why did the FTC not take aggressive action against mortgage lenders in the earlier part of this decade?

Mr. LEIBOWITZ. Well, Mr. Chairman, I would say sometimes the simple questions are the most difficult ones to answer, but let me try to respond. First of all, I think, as you know, we are a tiny agency by Washington standards. We have 270 attorneys doing consumer protection. And, as Mr. Radanovich and others mentioned, we cover the entire waterfront of the economy with a few exceptions like common carriers. So we have to—and we spent a lot of time doing things like stopping fraud, going after spyware, you know, because we talked about that together. Having said that, I think we did a pretty good job. You know, we brought 75 cases in the last 5 years. We have gotten in the last 10 years \$465 million in consumer redress, and that is just in this area of financial services alone.

Could we have done more? Yes, I think we could have done more. Will we do more in the future? Yes. And do we need to work with the state attorneys general? Yes, and we do it all the time. We are part of several regional task forces. The director of or Atlanta office or southeastern regional office has actually set up a task force with state AGs, and they are going after predatory lending. But, yes, we can do more. I have been exchanging phone calls with Attorney General Holder about resurrecting something called the Executive Working Group, which involved the Federal Trade Commission, the state AGs, and the Justice Department. And it was something that was used in the 1990s and the 1980s to sort of coordinate efforts. I think we are going to resurrect that, and I think that would be—you can ask Attorney General Tierney, but I believe that that will be something that is welcome by all the state AGs, and it will allow us to help coordinate even more.

Mr. RUSH. You asked for new authority for the FTC such as additional rulemaking authority, the ability to seek civil penalties, and possibly additional authority over banks and other depository institutions. But there are critics, and some of them are on this panel, or the next panel rather, and they argue that the Commission hasn't been aggressively using the authority it already has. My question is given the FTC's record over the past 8 years, why should we give this authority to you now? How can you assure us that you will use these authorities to aggressively protect American consumers?

Mr. LEIBOWITZ. Well, I think, you know, you raise a very fair question, but I would say this. We are hamstrung, speaking for my-self, we are hamstrung by the Magnusson-Moss rulemaking process. When you pass laws like Can-Spam, Gramm-Leach-Bliley, FACTA, you have given us APA rulemaking authority so that we can do rules more quickly. But in a Mag-Moss rule, and I think Mr. Radanovich raised the rationale for making rulemaking, and Congressman Stearns too, we are making rulemaking more complicated under Mag-Moss. It is a legitimate argument. But what we have found is that sometimes it takes 6 or 8 years to do rulemakings, and when it takes 6 or 8 years to do rulemakings, it is impossible to do a rulemaking in a timely manner to stop or to respond to a crisis.

So, for example, 2 years ago we did a sweep of Internet advertising for mortgages, and we found facially deceptive ads, over 200 different companies on the Internet. And the commissioners had discussions about what should we do about this. Well, we ended up bringing some cases against the worse malefactors. We wrote letters to everybody. Some people cleaned up their work. But we couldn't do a rulemaking because under Mag-Ross rules by the time we started or finished the rulemaking, we knew that Congress would legislate in this area, as they should. And so if we could have some relief from Mag-Moss, I think we can be more effective in helping consumers.

And it is a legitimate debate. I think when you reach reauthorization, which I know you want to do this year, we will have a discussion about the broader—about broader Mag-Moss rulemaking relief and finding malefactors. But again you can be much more effective if you have fining authority, which we don't have for violations of Section 5. You can be much more effective if you can do some sort of streamline rulemaking authority too.

Mr. RUSH. My time is up, but I want to inform the members of the subcommittee if the chairman will indulge us, we want to go through a second round of questioning. The chair now recognizes the gentleman from California for 5 minutes, Mr. Radanovich.

Mr. RADANOVICH. Thank you, Mr. Chairman. And welcome, Mr. Leibowitz, to this subcommittee. Congratulations on your recent appointment. I did want to ask a couple questions. This first one, I am going to ask about five questions to the subject matter about why would you like the FTC to have an APA notice and comment rulemaking to define unfair deceptive acts for financial services. Why isn't the current Section 5 authority sufficient?

Mr. LEIBOWITZ. Well, it is two things. First of all, in the Omnibus Act we have a fining authority for the rules that the fed issued under the FTC Act and rulemaking authority. We are going to use that to go after deceptive and unfair mortgage servicing and in some other areas. Why do we want expanded rulemaking authority? Because we think when you write rules, you can set standards for an entire industry, and here where you have—where you have many, many actors it is better to try to set standards, and also we have seen a pattern and practice of bad behavior by many companies. Not all, but many. And so we think it would be helpful. It would make us a more effective agency.

Mr. RADANOVICH. Do you have thoughts on what kind of rules you would like to propose for the activities that are not already covered under existing statutes?

Mr. LEIBOWITZ. We do. I think debt negotiation would be one area. We would want to work with the committee in thinking about other areas, but, yes, we do and we can get back to you with some more thoughts on that.

Mr. RADANOVICH. OK. What would be the most prevalent consumer fraud violations in financial services that you think the FTC should be pursuing that it currently can't?

Mr. LEIBOWITZ. Well, I mean I guess I would say this. We found a fair amount of fraud in the entire life cycle of the mortgage instrument, and when you have an economic downturn as severe as the one that we are in now, I think there is more of an incentive to see more of this, so we are—in the mortgage area we now have that rulemaking authority that was given to us in the Omnibus. We think that is going to be helpful. We think we are going to be able to find malefactors and write good rules, but I think—and we have deployed more resources. We have really doubled our resources in the last 2 years to go after predatory financial practices.

Having said that, there is just no shortage of bad acts that we could look at in this area. Most companies, of course, do the right thing but there are a lot of people who have just been ripping off consumers and the cases that we brought today sort of attest to that.

Mr. RADANOVICH. Right. Yes. And I will get on to those cases that you brought in just a second. One more quick question though. Why can't the Commission use your existing authority to propose rules defining unfair acts and practices for financial services? Why can't you use what you have now?

Mr. LEIBOWITZ. Well, again, we could do it, but if they are not—if it is not under APA rulemaking, notice and comment rulemaking, then it takes us literally years to do the rulemaking. I don't think that serves the American people well. I don't think it effectuates what you want us to effectuate on this committee.

Mr. RADANOVICH. OK. Thanks. Now with regard to the cases that you mentioned that you have presented a very good record of the cases that the Commission has brought under a multitude of laws that you already have to enforce but unscrupulous actors continue to violate the law. Will more laws or rules reduce that fraud?

Mr. LEIBOWITZ. I think, look, and we will have some of this discussion going forward when you look at our reauthorization, and growing the agency would be something that would be enormously important. We have about 1,100 employees. We do anti-trust and consumer protection. In 1980, we had 1,800 employees and the population of the United States was a third smaller than it is now. So part of it is more resources, but I also think part of it is the ability to have—the ability to have rulemaking authority.

Mr. RADANOVICH. And you have to balance this idea of dealing with the bad actors and there may be more of them out there, you know, during this financial crisis or not. I don't know how you measure how many bad actors are out there, but the other side of over enforcement is higher compliance costs, and where do you find the balance to where you are regulating so much that, you know, we have higher cost of goods out there as a result of it?

Mr. LEIBOWITZ. Well, Congressman, you are right. We have to strike the right balance, and reasonable people can disagree about exactly where that balance should be. But, look, we have brought 68 cases in the last 5 years in the financial services area against malefactors. We have no fining authority. Forty-seven attorneys general, I believe, have fining authority to go after people who violate the law, and so fining authority is something you get for violating a rule and that would make us much—that would be an very important tool in our arsenal. And, by the way, when you pass pieces of legislation like Can-Spam, which came out of this committee, you have given us that fining authority, at least for specific matters. So it is a discussion we want to have with you going forward but that would be one thing that would make us more effective, I think.

Mr. RADANOVICH. All right. Thank you for your answers. And thank you, Mr. Chairman. I yield back.

Mr. RUSH. The chair thanks the gentleman. The chair now recognizes the gentlelady from California, Ms. Matsui, for 5 minutes for questioning.

Ms. MATSUI. Chairman Leibowitz, as I mentioned in my opening statement, the issue of loan modification scams is a growing problem, particularly in California where we have the highest number of homes going into foreclosure. We hear individuals and companies advertising on radio and television with a simple message that they can lower your mortgage payments, stop your foreclosure. And many of these people are calling themselves foreclosure consultants or in some cases acting like they were government agencies like HUD. They make guarantees and promises to homeowners seeking help to save their home, but this help usually comes with a price tag in the form of an advanced fee between $1,500 up to $9,000.

That being said, I would like to hear what the FTC is doing to crack down on these fraudulent loan modification scams. In your written testimony, you announced two new cases targeting mortgage foreclosure rescue scams bringing the total to eight such cases. Is enforcement the right approach to ending this type of fraud? You initiated 8 cases. Will those cases serve as a deterrent to other scammers and other steps that the FTC can take to end these practices?

Mr. LEIBOWITZ. Well, that is a great question, and we do think that these—and, by the way, I should mention that we are also members of the Sacramento Task Force and many task forces in your districts around the country. Well, I do think that the cases against Hope Now and New Hope, which are two entities that are claiming to be affiliated with the Hope Now alliance, are ones that will be helpful as a deterrent but we also think that rulemaking authority and fining authority will make our ability to deter more effective. And again we want to do rules because they are needed in the mortgage servicing area, in the mortgage modification, and rescue area, and going after rescue scams. So we would like to be able to use the whole arsenal. We have been given some authority in the Omnibus Appropriations Act that will be helpful. We are looking for more authority from this committee and we want to move forward with that if the committee believes it is appropriate.

Ms. MATSUI. OK. Some examples of fraudulent schemes are, as we mentioned, advance fee scams where, you know, consumers are charged for services that are never rendered, and in exchange for this fee, it is up from $1,500 to $9,000, homeowners are promised guarantees to save their homes. In some cases, consumers usually pay these fees with a credit card, which should make it easier to track the payment and help the consumer recoup their money. What is the government doing to help recoup these advance fees to make consumers whole again, and is there a mechanism in place to help consumers recoup their advance fees?

Mr. LEIBOWITZ. Sure. I mean when we bring these cases, and, by the way, the Hope Now case is a case that involved an advance fee of $1,000 to $1,500. My understanding is that when consumers—consumers got no help whatsoever or very little assistance. When they asked for their money back, it was done. So when we bring these cases, we try to ask for a disgorgement of profits. We try to get redress to consumers. In the case we brought against Bear Stearns as a subsidiary, EMC we got 86,000 redress checks issued. But it is tough because sometimes these assets dissipate and sometimes it is hard to determine, you know, not in these cases but in other cases which ones were fraudulently made or which advertisements were deceptive and which ones weren't and that is why a penalty authority will be very helpful to us if we can get it.

Ms. MATSUI. Well, do you think Congress should ban these advance fees?

Mr. LEIBOWITZ. I would want to come back—I would want to think about that. I would want to think about that. We certainly see experience—we certainly had experience with these advance fee scams including advance fee credit card scams that make us think that certainly the practice of a lot of companies should be prohibited. But as far as advance fees generally in the financial services area, I would want to think about that because there may be some value when legitimate companies are doing some things with advance fees.

Ms. MATSUI. So would you think then that the FTC should declare its view that it is an unfair practice to charge an advance fee for services that do nothing to save a home?

Mr. LEIBOWITZ. Well, I would certainly think that we could look at that in the context of our rulemaking and some states, I believe, so ban advance fees in the financial services area so it is something we can take a look at. I think we probably should in the context of any rulemaking authority we have been given in the Omnibus or that you give us additionally.

Ms. MATSUI. Well, thank you very much, and I see my time is up. Thank you.

Mr. RUSH. The chair now recognizes the gentleman from Nebraska, Mr. Lee Terry.

Mr. TERRY. Thank you, Mr. Chairman. I appreciate this. The gentlelady brings up, I think, several good points, and I think really gets to the heart of the matter, and that is if we are going to stream line rules, the procedures for the rules, we want to make sure that it is going to be effective in protecting consumers and that you will be able to use the FTC's authority. But the argument here about advance fees begs the question of who is ultimately going to be able to decide what is deceptive and what is not. Sometimes it is obvious where you can put 100 people together and they will say that practice is deceptive. There are other things like maybe advance fees that some people will say are deceptive or that are wrong, but they are not deceptive.

And so how are we going to split those hairs if you are coming to us and asking us to streamline the rules or the procedures to make your rulemaking. Who should have the authority in there to determine which specific practice is deceptive or not deceptive?

Mr. LEIBOWITZ. Well, I think that is right and in some practices maybe deceptive as practiced by some companies whereas other companies may do them in a legitimate way.

Mr. TERRY. That is why it is really——

Mr. LEIBOWITZ. Right. It is a good question and whether we have—whether we are bringing cases or whether we are enforcing rules that we promulgated, we have to go before a federal judge, so there is that mechanism as a check and balance against any excesses of the FTC, but I don't believe anybody has suggested at least in the last 25 years that we have engaged in any excesses at our agency. I think people think that we are a pretty good—I think people think that we are a pretty good agency and we try to do the right things with our limited resources and leverage of resources.

Mr. TERRY. In specific about streamlining the rule process so you can be more nimble, do you have specifics for us or is that just kind of a general statement that would be helpful for you?

Mr. LEIBOWITZ. Well, I think it is both in the sense that if we have a—if we have more agile rulemaking, something closer to APA rulemaking, we can respond more quickly. I do think that we are going to, you know, use the APA rulemaking authority given to us in the Omnibus Act to address foreclosure rescue scams where we know there are very, very serious problems, mortgage modification where we know there are problems. We know that both because we have testified to it and others have, and also because of the Bear Stearns case where we saw lots of embedded fees that consumers just didn't know about and are being hit with.

Mr. TERRY. Yes, those get to be fairly obvious.

Mr. LEIBOWITZ. And let me just add my point to that that advance fees are prohibited under CROA. We prohibit the under the telemarketing sales rules which is an FTC rule, and in some instances, not in every, but in some instances it has really sort of helped clean up bad practices that harm consumers.

Mr. TERRY. All right. And those were developed within your own rules? You decided in those instances——

Mr. LEIBOWITZ. The telemarketing sales rules were promulgated by us pursuant to legislation enacted by Congress in the early 1990's, I believe.

Mr. TERRY. Right. But for those specific instances with the specifics of advance fees, that was something that you did within the FTC by rulemaking?

Mr. LEIBOWITZ. Yes, that is exactly right.

Mr. TERRY. And that is the point that I am getting to. I guess there are two sides of the coin that we can look at here and one is we can criticize the FTC over the last 8 years for not being aggressive enough. Eight years from now are we going to look back at the FTC when we streamline your rules and say you were overly aggressive and without specific congressional approval defining general practices as deceptive practices thereby freezing trade?

Mr. LEIBOWITZ. Look, it is a fair question but I think in these times of, you know, where we have seen so much harm to consumers by deceptive acts and practices, you might want to—given that we are an agency that has a track record for being aggressive but balanced, you might want to err on the side of giving us more authority. Believe me, in the 1960's and 70's Congress was always able to pare us back when they thought we were going a little bit too far. But, again, you know, in areas like debt collection, in-house debt collection where we have seen problems including in the Bear Stearns case and debt negotiation, those would be areas not covered by the Omnibus where we think we could do——

Mr. TERRY. In my last 14 seconds, I am just very curious, in the last several years in the financial services area you have brought 40 or 60——

Mr. LEIBOWITZ [continuing]. Sixty-eight cases.

Mr. TERRY [continuing]. Sixty-eight complaints. Generally what were those? What is the major area?

Mr. LEIBOWITZ. It is really a combination of different areas. It is 7 mortgage advertising, 5 pay-day loan cases—6 pay-day loan cases, a couple of fair lending cases, mortgage servicing cases, 9 foreclosure rescue scam cases, and 12 credit counseling cases, and 11 debt collection cases. Those are the—and, sorry, 17 credit repair cases as well. So it is a combination of—it is different areas mostly within our financial services group, and then we have had our regions. We have 7 regional offices around the country doing more in this area because it is a high priority for us.

Mr. RUSH. The gentleman's time is up. The chair now recognizes the vice chair of the subcommittee, Ms. Schakowsky, for 5 minutes.

Ms. SCHAKOWSKY. Thank you. Chairman Leibowitz, since 2001, state attorneys general have been active, often aggressively pursuing the bad actors in the field of consumer credit. They took the lead on cases like Household Finance, AmeriQuest, Countrywide, and uncovered extensive abusive practices, inflated appraisals, fabricated income statements, misrepresentations to borrowers, illegal and deceptive fees, and rates. Was the FTC approached to participate in these activities?

Mr. LEIBOWITZ. You know, some of those cases took place before I came to the Commission. I believe in AmeriQuest, which is a terrific case by the state AGs, we approached them about whether they needed our help because we are always happy to help with cases and we work a lot with state AGs, and I think that they were—I think that they demurred on that, that they were——

Ms. SCHAKOWSKY. But my understanding that in fact the Commission has often opted not to participate. In fact, a former attorney general, James Tierney, who will be sitting on our second panel, in his testimony he states that the past 8 years have been a time of limited cooperation between the FTC and state attorneys general with respect to enforcing consumer protection in the areas of consumer credit, and so would you agree with this assessment?

Mr. LEIBOWITZ. Well, I would say this. I can't speak for the first four—from 2000 to 2004. I wasn't at the Commission. From 2005 through now, we have been working fairly often with the states. We are involved in regional task forces. But, look, we can certainly step it up and we certainly will. And one of the things I am very heartened about is our very positive conversations with Attorney General Holder about resurrecting the executive working group, which had sort of—which was very active in the 1990's and sort of was flailing in the last 8 years. It is a way for us to help coordinate with the Justice Department and with state AGs through regular meetings, regular consumer protection activities, so I think that will be a big plus.

Ms. SCHAKOWSKY. Wonderful. Let me talk about a different area. Under Section 18 of the FTC Act whenever the Commission promulgates a rule on unfair or deceptive acts of practices dealing with consumer credit matters the Federal Reserve and other banking agencies are required to promulgate a similar rule for depository institutions or explain why such a rule is unnecessary. So were we to give the FTC speedier APA rulemaking under Section 18 of the FTC Act, would this not ameliorate at least somewhat the lack of functional or regulatory parity because of the reciprocal requirements under Section 18 whereby banking agencies have to consider the FTC's lead?

Mr. LEIBOWITZ. Well, Congresswoman, it might very well be helpful but I think what your question touches on, and I know you know this, is the sort of incredible balkanization, right?

Ms. SCHAKOWSKY. Right.

Mr. LEIBOWITZ. Consumers don't know whether they got—consumers don't care whether they got a mortgage from a bank or whether it came from a mortgage, a non-bank mortgage.

Ms. SCHAKOWSKY. Right.

Mr. LEIBOWITZ. If it is deceptive, if it is, you now, a sub-prime loan or a non sub-prime loan with hidden fees that they don't know about, it is hurting them. So we have a sort of balkanization of authority here. There are three or four different banking entities or banking agencies that have some jurisdiction over the 60 percent of the mortgages that are issued by banks. We have jurisdiction over the others. And I think that is why Elizabeth Warren and the professor at Harvard and a variety of folks on the hill are thinking, you know, that it may be time to have one single entity that protects consumers from predatory financial instruments. And certainly I know people on this committee are thinking about that, and I want to make sure that you know from our perspective we are a consumer protection agency.

Ms. SCHAKOWSKY. So you could do banks as well is what you are saying?

Mr. LEIBOWITZ. We could do banks as well, I would say with this qualification. The banking agencies, you know, they are mostly concerned with safety and soundness. We don't do safety and soundness. We are not those kinds of bank regulators but if you want an entity to do consumer protection for consumers who have financial instruments, we can do that really, really well.

Ms. SCHAKOWSKY. Let me ask the final thing.

Mr. LEIBOWITZ. Sure.

Ms. SCHAKOWSKY. There was a colloquy on the Senate floor that clarified the authority that is this trigger under Section 18 was not under Section 18 and only applied to non-banks. Do you see this if it goes forward as a missed opportunity?

Mr. LEIBOWITZ. Well, you know, do I personally see this as a missed opportunity? I certainly think Congress needs to look at the notion of a single entity whether it is housed in the FTC or whether it is a new one to protect consumers from predatory financial instruments, deceptive and unfair ones. I see this as actually an opportunity for us because the language in the Omnibus Appropriations Act gives us rulemaking throughout the entire life cycle of a mortgage only of course for non-bank issued mortgages. But that is a real opportunity to do rulemaking, and after we do rulemaking to actually be able to have standards, get those from rules, and to find malefactors who fall below those standards.

So I see your point, and we are very supportive of Congress having a discussion about creating an entity to protect consumers here, but I also think we have been struggling for this legislation for quite some time. It is going to be helpful to us.

Mr. RUSH. The chair now recognizes the gentlelady from Ohio, Ms. Sutton, for 5 minutes.

Ms. SUTTON. Thank you so much, and thank you, Mr. Chairman, for your commitment to look after the entire life cycle of credit. There are so many questions that I have, I am going to probably going to need to follow up after the course of this hearing to try and unravel exactly what is going on out there because I can tell you that my constituents are feeling the effects of all of this confusion. It is kind of confusing for anyone who is watching this hearing to figure out who has authority over what, and who has the responsibility to protect them let alone, you know, know where to turn. So in the last line of questioning from my distinguished colleague, Representative Schakowsky, we are talking about the new opportunity you have within limits for rulemaking.

But if I was to ask you this question, it sounds to me like you have limited opportunity for rulemaking that will provide some people protection but there is whole other category of people out there who may be suffering from the very same thing and the same practices over which you have no ability to help them, is that correct?

Mr. LEIBOWITZ. That is correct.

Ms. SUTTON. Let me go on record as saying I don't think that makes any sense.

Mr. LEIBOWITZ. That makes a lot of sense, and again in going back to Ms. Schakowsky's questions, one of the other things that is sort of peculiar about this rulemaking is that the fed can enact, promulgate rules under the FTC Act by notice and comment rulemaking, APA rulemaking, the simple rulemaking that we can then enforce for over non-bank mortgage companies, over non-bank issued mortgages. But if we want to do that rulemaking right now, it would have to be under Magnusson-Moss and it would never get done because contested rulemakings under Magnusson-Moss just don't get done, so we are glad that they promulgated these rules. We are glad we can enforce them.

We think those rules are going to be helpful in curbing bad advertising and things like liar's loans but it is like trying to—even for the Commission, and all the commissioners are very, very hard working, you know it is like running through a rabbit warren to try to figure out how these laws interact and regulations interact with each other.

Ms. SUTTON. Well, again, I appreciate that very much because it seems like we should be able to inject some more sense into the process and into this puzzle. In your testimony on page 8 you talked about suing a credit card marketing company. Obviously, you can reach the credit card marketing company. Can you tell me what exactly is a credit card marketing company?

Mr. LEIBOWITZ. Well, we can't reach—as you know, we can't reach bank issued credit cards, which is about, I think someone said 75 percent. I think it is now probably up to about 95 percent. So a credit card marketing company is simply a non-bank affiliate or surrogate that markets the credit card, and what we found with some of our advance fee cases is they will say you can have a credit card, give us $500, and then when you give them $500 some of it is taken away by fees, by prohibitive monthly costs or you can only use the credit card to buy from their catalog, so those are some of the types of cases we have brought.

And then we had a major case involving a company called CompuCredit, which we brought jointly with the banking agencies where they had—and it was a credit card company that actually targeted sub-prime borrowers, people who couldn't otherwise get credit, so that is sort of laudatory at some level. But the credit card limit was $300, and the first month had $185 in fees, which weren't accurately disclosed we alleged, and we had a settlement for $115 million for consumers just the end of last year. That was very, very important for us.

Ms. SUTTON. OK. So the question that I have though is if a bank is engaging in the exact same activity, can you do anything about it?

Mr. LEIBOWITZ. You know, we could run across the hall to the banking agencies where they are testifying and tell them they should take a look at it. We can go talk to them, but we can't do anything about it.

Ms. SUTTON. That is my point, and that is my concern. OK. Mr. Chairman, I will hold my questions at this point until the next round.

Mr. RUSH. The chair thanks the gentlelady. The chair now recognizes my friend, the gentleman from Pennsylvania, Mr. Pitts, for 5 minutes.

Mr. PITTS. Thank you, Mr. Chairman. Mr. Leibowitz, as an overwhelming number of mortgage fraud cases began to surface in 2007 the FBI formed a financial crimes task force and has had more cases than it can handle, and these are largely criminal fraud cases. Does the FTC have a role in investigating these cases? If so, would you elaborate?

Mr. LEIBOWITZ. I want to get back to you on those cases. We do a lot of work with the postal inspectors. We do some work with the FBI, of course, but when we see something that is criminal we generally refer it to the Justice Department, and if they will take it they have more appropriate sanctions than we do. We generally can only get redress and disgorgement and stop the bad conduct, so sometimes we are sort of the fallback entity for going after fraudulent behavior in this area, but I will get back to you on whether we have worked with the FBI task force specifically.

Mr. PITTS. OK. Thank you. The Commission has conducted research on ways to improve mortgage disclosure. If the disclosure documents were simplified in a manner that provided relevant information similar to the prototype disclosure developed by the Commission, would that have prevented any of the fraud that occurred in the home mortgage loan market in your opinion or might fraudsters simply find a way around that simplified uniform disclosure?

Mr. LEIBOWITZ. Well, I would say this. Fraudsters, you know, can often find a way around even simplified disclosures, and I hope all of you have the draft disclosure form on your desk. If not, we will make sure we get you copies. But sometimes what is happening is that consumers don't see imbedded fees, and what we have done with our sort of disclosure form, it is simple. We have copy tested it. In other words, we have asked consumers to look at this and compare it to the existing HUD, RESPA and TILA forms that they use. And those forms have both—they are both over inclusive and under inclusive. They have too much information so consumers don't know what to focus on, and they don't focus on some specific aspects of information.

So can I say to you that it would prohibit—it would have stopped a specific fraud? I don't think so. But would it have sort of helped some consumers make more informed decisions when they are dealing maybe not with deception but more with unfairness? We think it might have. And even, by the way, for consumers these forms or this draft form and others like it, it doesn't just help the consumer who is being ripped off. It helps the consumer who wants to be able to make informed choices, and say, well, here, you know, the fees are going to be more and here the fees will be—here the fees and the overall cost of the loan will be less. So that is just helping consumers like all of us make choices from among competitors.

Mr. PITTS. The FTC prohibits both unfair and deceptive practices.

Mr. LEIBOWITZ. That is correct.

Mr. PITTS. Unfair is defined as any act that causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. Bringing an enforcement action for violation of a deceptive practice is much more common for the FTC. Why are unfair cases brought so infrequently?

Mr. LEIBOWITZ. Well, I think, you know, you articulated—I think you read directly from the statutory authority we have. It is harder to show unfairness. Unfairness is sometimes a more amorphous term, so when we see—when we are going after a typical bottom feeder who is ripping off consumers, we just see it is clear deception. But sometimes, for example, in our spyware cases and in a variety of our other cases involving data security and Internet-related problems, we will use unfairness. We have been using it actually more in the last several years because we think it is important.

Mr. PITTS. Should unfair acts be better defined to provide greater certainty to make enforcement easier?

Mr. LEIBOWITZ. I would say certainly if we had a little more leverage in our unfairness standard, we might be able to bring unfairness cases more often. We had a much broader standard in the 1960s and 1970s, and through the late 1970s, and then Congress asked us to modify first of our own volition and then it put it in the statute, I think, in 1992, our unfairness authority. So this has been the subject of some debate going back and forth about whether we should have a little more flexibility here. We would love to work with you on this.

Mr. PITTS. Thank you. My time is up. Thank you, Mr. Chairman.

Mr. RUSH. The chair now recognizes the gentleman from Texas, Mr. Green, for 5 minutes.

Mr. GREEN. Thank you, Mr. Chairman. Mr. Chairman, an issue came up just now, and I was going to ask you, is there any numbers that the FTC could share with the committee on the number of criminal prosecutions it referred to the Justice Department that actually are taken by the Justice Department because I think that is something we would like to see.

Mr. LEIBOWITZ. Yes, we will get you—we will get you that information. We do have Tim Yuris, who is the first chairman under Chairman Bush, set up a criminal liaison unit and which we still have and which takes some of the cases that are clearly of a criminal nature where we started investigations and sends it over to the Justice Department or to certain other prosecutors, so we can get you that information. Some of it—with the caveat that I have to go back and look. Some of it may be confidential. And then sometimes, again, as you know from the cases because you know our agency——

Mr. GREEN. We just need the numbers.

Mr. LEIBOWITZ. Yes, we will get them.

Mr. GREEN. The percentages, and if there are cases that are definitely not controversial, it would be interesting to see what type of cases may not be accepted and what type would be.

Mr. LEIBOWITZ. Right. I can just tell you as a general matter sometimes the cases don't rise to the level of ones that the Justice Department wants to prosecute so we do it ourselves.

Mr. GREEN. OK. And you have the ability to do it yourself?

Mr. LEIBOWITZ. Not as a criminal matter but as a civil matter so to stop ongoing harm.

Mr. GREEN. Our office has been hearing from constituents concerned that the free credit reports do not list all the information that credit lending entities have access to. Do you know if there is a case and, if so, do you believe consumers should have access to all this information? It seems that consumers should have access to all the credit information available to them. Have you heard of that or has that been an issue with the FTC?

Mr. LEIBOWITZ. Yes. We brought a case, I think in 2002–2003 before I got to the Commission freecreditreport.com. I think I am summarizing it but I believe they are actually charging fees. There is a place where consumers can go to get a free credit report without entering into a contract, a monthly contract, and I think that is called annual credit report. And we actually, not to make light of this, but we actually put out a spoof of freecreditreport.com that got picked up by You Tube and by a variety of other media outlets just 2 weeks ago. So this is an area of some concern to us, and I know the consumers—we do get complaints on this.

Mr. GREEN. That is what I was going to say. There may be things that the consumer may not—that is not on that report that is being used for their credit rating.

Mr. LEIBOWITZ. Credit source, are you talking about credit source? Yes, they are included in the free credit report.

Mr. GREEN. And is there any restriction on what can be considered to go into your credit score either by practice or by rule or statute?

Mr. LEIBOWITZ. Let me, Congressman, get back to you on that. It is a legitimate question and I want to give you the right answer.

Mr. GREEN. I know I only have a minute left, but there are many varieties of mortgage foreclosure rescue fraud but in each case the perpetrator makes misleading promises that the consumer's home will be safe from pending foreclosure permanently. Most consumers end up losing their home, however, as well as the money they paid to these scammers. I am aware the FTC took action in February to sue a company operating one of these scams, and I commend you for that. How widespread is the problem and does the Commission have the tools and resources to go after a lot of bad actors, not only the ones you see but it seems like some of it may be cottage industries that we are seeing in regional areas and not maybe national.

Mr. LEIBOWITZ. Right. Well, with the entity that we just brought an action against today that is impersonating HUD, we are having sort of a whack-a-mole problem with them because we found the site. We found the site. The HUD inspector general took it down. Then it popped up again under a web site from Germany, registered in Germany, and then we have taken that site down, so we have a little long arm problem in terms of asserting our jurisdiction. The other thing is that if we can find these malefactors which the Omnibus Appropriations Act will let us do or provision that Senator Jorgen got into the Omnibus Appropriations Act will let us do, I think that would be very, very helpful, and we will do a rulemaking on foreclosure rescue scams and also deceptive modifications.

Mr. GREEN. If you would share that with us even though we are not a writer of the appropriations bill and maybe not rise to the need for an authorization, but some of us could help with getting the encouragement of the appropriators to include that.

Mr. LEIBOWITZ. We would love to work with you. We would love to help.

Mr. GREEN. Thank you.

Mr. RUSH. The chair now recognizes the gentleman from Michigan, Mr. Stupak, for 5 minutes.

Mr. STUPAK. Thank you, Mr. Chairman. Chairman Leibowitz, thanks for being here. The Commission, as you have indicated, has authority under Section 18 of the Federal Trade Commission Act, and I understand it is particularly cumbersome. Instead of promulgating rules under the APA, the Commission must go through a far more difficult process known as the Magnusson-Moss Act. So my question is since you have been chair, has the Commission considered promulgating the rule under the Magnusson-Moss Act or have you just sort of disregarded the whole process?

Mr. LEIBOWITZ. We have a few rules that we are in the process of promulgating outside of this area under Mag-Moss, but they are generally sort of not good government rules but non-controversial rules because under Mag-Moss if you want to promulgate a rule and there is an opposition to that rule they get to require an independent referee, multiple rounds of submissions, and it takes a really long time.

Mr. STUPAK. Do you think Congress should just repeal that?

Mr. LEIBOWITZ. I would say this. There are probably some legitimate reasons why Congress gave us this cumbersome rulemaking.

Mr. STUPAK. Can you give me one reason why they would give you such a burdensome procedure if our purposes——

Mr. LEIBOWITZ. Off the top of my head, no, but I would say this. I certainly think some relief from Magnusson-Moss would be justified. I think the original—look, we are an agency that Congress wanted to give us when they created us in 1914 enormously broad jurisdiction but fairly limited remedies, as opposed to the Justice Department where they have to go after more specific crimes and they put people in jail. They have fining authority. And so the rationale for Mag-Moss, I suppose, is that it sort of slows things down because we have such broad jurisdiction. I do think over time what we found is that some relief to Mag-Moss would be helpful in allowing us to have leverage over the bad guys.

So, for example, I think 47 attorneys—when you promulgate a rule, you can get a fine for a violation of a rule. Otherwise, when we use our Section 530, you can't do that, and so if we can find malefactors as 47 attorneys general can do, that would make us more effective in doing what you want us to do, which is protecting consumers.

Mr. STUPAK. In order to protect consumers, you have to move quicker. I mean we don't want you to be the Justice Department, you indicated you don't have fines and all that, but isn't really your power is to look for that unfair and deceptive practices and act quickly to cease and desist. Isn't that really the role of the FTC? It seems like Magnusson-Moss is just the opposite. It slows you down so you cannot be nimble and react to current trends.

Mr. LEIBOWITZ. That is exactly right. In a controversial rulemaking, you know, in a rulemaking where there is opposition, and many good rulemakings have opposition, you know, we would always look to see what all stakeholders want. Of course we are going to do that, and we are going to do that in the rulemakings that we got in the Omnibus Appropriations which will be APA rulemakings.

Mr. STUPAK. Right, but even that is limited in the Omnibus. Your rulemaking authority, that is somewhat limited, is it not?

Mr. LEIBOWITZ. It is limited. It applies to mortgages but not other financial instruments not issued by banks, and of course it only goes to non-bank issued mortgages, but it is still better than what we had so we are very grateful for it and we thank this committee for protecting it in the Omnibus.

Mr. STUPAK. Well, let me ask you this. Since 2001, the attorneys general have been active and very aggressive in pursuing bad actors in the field of consumer credit. They took the lead on cases against Household Finance, AmeriQuest and Countrywide, and uncovered extensive abuse of practices, inflated appraisals, fabricated income statements, misrepresentations of borrowers, and illegal and deceptive fees and rates. Was the FTC approached to participate with the AGs in their——

Mr. LEIBOWITZ. In some cases we have, and we have participated with them. In some cases, they have done it on their own, and I believe demurred when we offered help. And then probably there are some cases again in hindsight that we should have been involved in earlier but they took the lead. The attorneys general have been terrific in protecting consumers. I don't think we have been slackers at all. I think we have been pretty good but on a going forward basis we are going to work more with the attorneys general.

Mr. STUPAK. OK. So how do you envision working closer relationship between the states as you are now the newly appointed chairmanship because I think it is important while the states bring forth but sometimes they look to you for resources and to help them with these investigations, and I would think what goes on in one part of the country is probably going on in the other part of the country and therefore the FTC should be more involved and should have a closer working relationship with the state AGs.

Mr. LEIBOWITZ. Well, I absolutely hear that, and of course we can have—it is easier for us to get remedies that apply across all states, and so many of the bad acts in the mortgage industry——

Mr. STUPAK. Well, have you reached out to the AGs?

Mr. LEIBOWITZ. Yes. We have reached out to the AGs, and we have also reached out to the attorney general. You may not have been here when I talked about this, but we are in the process of trying to resurrect something called the Executive Working Group which was very active in the 1990's, sort of stopped in the last 8 years, that involves Justice, the attorneys general, and the Federal Trade Commission having regular meetings to coordinate activities. That is going to be very, very helpful going forward.

Mr. STUPAK. You are right. I didn't hear that earlier testimony but I am glad to hear it and urge you to continue that progress. Thanks.

Mr. RUSH. The chair thanks the gentleman. The chair now recognizes himself for 2 minutes of additional questions. Chairman Leibowitz, if this Congress would enhance your authority, can the Commission set up a separate office to regulate and enforce consumer abuses and, if so, would this cover other substance of the FTC?

Mr. LEIBOWITZ. Well, I would say this. As you know, Mr. Chairman, we are a small agency with a pretty large mission and we have to leverage our resources all the time, so if you give us that authority, and I think a majority of the Commission would be willing to embrace that authority and I think we could do good things for consumers, we will need more resources. I don't know that we need to grow to the level we were at in 1980, which was 1,800 FTEs, but I think to discharge—what you don't want us to do is to take people from spyware cases and other types of fraud cases and then simply move them to the newest, most problematic area and forget about all the other things we do.

So I think we need more resources. I do know the appropriations committees are interested in giving us more resources and have given us small plus ups over the last couple of years because they like what we are doing, but we probably need additional resources on top of that.

Mr. RUSH. I have less than 1 minute, and I just want to ask another question on pay-day lending. I believe that pay-day lenders have a role in our economy but there are far too many abuses. Does the FTC have authority to crack down on pay-day lending practices such as rollover fees and the specific statutory language leading to direct the Commission to adequately deal with certain abusive pay-day lending features?

Mr. LEIBOWITZ. Well, I would say yes and no. We have brought about a half dozen pay-day lending cases in the last 5 years. We don't have obviously—Congress set a cap, I believe, for pay-day loans outside of military bases at 36 percent a couple of years ago. We obviously don't have the authority to set a cap but one thing we found in our pay-day loan cases is the imbedded—is that malefactors have sort of imbedded fees that consumers don't know about, and so they will pay off their loan in 2 weeks but it will be a day late, and so then there will be a fee that pops up and then it is compounded and then they are sort of in a worse circle of debt. So we have the authority to do that.

I think if you gave us the authority to go—if you gave us the authority to do rulemakings, we would look at ways to promulgate rules that would require better behavior by a lot of the pay-day lenders.

Mr. RUSH. The chair recognizes Mr. Radanovich for 2 minutes for additional questioning.

Mr. RADANOVICH. Thank you, Mr. Chairman. Mr. Leibowitz, you had mentioned that the commissioners decided not to initiate a rulemaking on deceptive Internet advertising, and the reason was because Congress would eventually act on the issue which you would have if you could proceed under the APA. And it sounds like, and we can have a discussion about this, that you are suggesting that the FTC APA rulemaking would obviate the need for legislative body at all. And adding to that question, I think I would ask isn't the Magnusson-Moss process intentionally deliberate similar to the congressional legislative process? I mean the founding fathers set this whole thing up so that legislating was difficult, and should your job be made easier or should you have to deliberate with us for a proper approach——

Mr. LEIBOWITZ. All of us think our jobs should be made easier, but I don't mean to suggest that we would have obviated the need for congressional legislation if we had been able to do a rulemaking. And I don't mean to say that we wouldn't have stopped, you know, the economic mess that we all know we are in, but I do think we could have cleaned things up more quickly if we had APA rulemaking or something close to APA rulemaking, but again these were just discussions among commissioners because we knew that under APA—we knew that under Mag-Moss rulemaking it would be very, very hard to do a rule in a timely manner.

And that is the problem with Mag-Moss rulemaking. I don't mean to say—I don't know if you were here when I was having a conversation with Mr. Stupak. There is a rationale for having us make rules more slowly, and certainly among folks who follow the FTC and have for years and decades there might have been some excesses perceived or real in the 1970's that led to some of the restrictions. For example, the restriction on unfairness that makes, as Mr. Pitts pointed out, makes it difficult for us to bring an unfairness case. But having said that, I think it is worth, and I know you are interested in just discussing this issue further about whether it makes sense to give us some relief from Mag-Moss. It doesn't necessarily mean it has to go all the way over to APA rulemaking, but I do think in some areas, you know, you want us to be able to act more nimbly, more agile and more quickly, maybe not in every area but in some.

And when you pass new rules or new laws like Can-Spam, you have given us that APA rulemaking, and we have that APA rulemaking in the Omnibus for mortgages, for everything in the mortgage life cycle. So one thing is watch to see how we do in the mortgage with the rulemaking authority we have. If we do a balanced job, maybe it makes sense to give us just a little bit longer leash.

Mr. RADANOVICH. Thank you.

Mr. RUSH. The chair now recognizes the gentlelady from Ohio for 2 minutes.

Ms. SUTTON. Thank you, Mr. Chairman. You heard some discussion here about the state attorneys general, and in my opening statement I talked about some of the actions that we have taken in Ohio, but even after all that we have done, I am going to read to you the headline of a report from the Housing Research and Advocacy Center that is in Cleveland. The headline reads pay-day lenders operating in 81 Ohio counties charging up to 680 percent interest. Lenders avoiding the 28 percent APR cap passed by legislature and voters, and that is at the state level, in 1,020 stores statewide. And just to give you an idea of what is happening here despite legislation passed in 2008 aimed at lowering interest rates on short-term loans pay-day lenders are operating, as the headline reads, in 81 of Ohio's 88 counties making loans in some cases that carry that extraordinary annual percentage rate, 24 times more the rate that was approved by the legislature for such lending.

And they have avoided the 28 percent cap by using other laws, so they are very crafty and they are very quick making the necessary adjustments to continue to reap what they reap. I guess my question just is what can you do to help or what can we do to help?

Mr. LEIBOWITZ. Well, I mean there is no magic bullet for solving these problems, as I am sure you know. I was asking my staff about usury laws in different states yesterday as I was preparing for the hearing, and someone pointed out that in Missouri the cap is 2000 percent, so you borrow $100, you forget about it, the next year you owe $2,000. Look, one part is working with attorneys general because we have to leverage our limited resources, and that is a part of it. Another part is consumer education. We have a terrific consumer education group and that is a part of it. You know, I wish I could tell you there is a particular answer to this problem but it is—there just isn't, and we all have to sort of pull—and, by the way, as more people are unemployed as the economy continues to spiral down, you are going to see more of these problems. You are going to see more people borrowing from pay-day lenders.

Now Congress made the determination that outside of military bases pay-day lenders should be capped at, I think, 36 percent. I suppose Congress could make the determination that pay-day lenders should be capped at 36 percent and limited in fees, but that is a decision for you to make. I will say this. If you give us more authority to do rulemaking in this area, we will take a look at pay-day loans.

Ms. SUTTON. With the chair's indulgence, I appreciate that, and thank you for bringing up the issue about loans near military bases, and I would like to follow up with you about that as well because I understand that still problems remain, and I would like to talk about how we actually aggressively go after that.

Mr. RUSH. The chair thanks the gentlelady, and the chair thanks the chairman again for the extensive use of his time. We know that you are quite busy and we certainly thank you for your enlightening commentary to this committee. We do intend to work with you on these and other matters as we proceed. And we just want to let you know that we appreciate your presence here.

Mr. LEIBOWITZ. Thank you.

Mr. RUSH. The chair now calls the second panel to the witness table. The chair wants to welcome this extraordinary panel before the committee, and we want to introduce you individually, and then we will ask that you all stand after your introduction so that we can swear you in. To my left, Mr. James Tierney. He is a Lecturer-in-Law at Columbia Law School, and he is the former attorney general of Maine. Welcome, Mr. Tierney. Next to Mr. Tierney is Mr. Christopher Peterson, Professor of Law at the S.J. Quinny College of Law. Welcome, Mr. Peterson. Next to Mr. Peterson is Mr. Ira Rheingold. He is the Executive Director of the National Association of Consumer Advocates. Mr. Rheingold, welcome. And next to Mr. Rheingold is Mr. Nathan Benson. He is the CEO of the Tidewater Finance Company, Inc., and he is testifying on behalf of the American Financial Services Association. Welcome, Mr. Benson. And now I would like to swear the witnesses in. Will the witnesses please stand and raise your right hand?

[Witnesses sworn.]

Mr. RUSH. Let the record reflect that the witnesses all answered in the affirmative. The chair recognizes Mr. Tierney for 5 minutes for the purposes of an opening statement.

TESTIMONY OF JAMES TIERNEY, LECTURER-IN-LAW, COLUMBIA LAW SCHOOL; CHRISTOPHER PETERSON, PROFESSOR OF LAW, S.J. QUINNY COLLEGE OF LAW; IRA RHEINGOLD, EXECUTIVE DIRECTOR, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES; AND NATHAN BENSON, CHIEF EXECUTIVE OFFICER, TIDEWATER FINANCE COMPANY, INC., FOR THE AMERICAN FINANCIAL SERVICES ASSOCIATION

TESTIMONY OF JAMES TIERNEY

Mr. TIERNEY. Thank you, Mr. Chairman. My name is Jim Tierney. I am the Director of the National State Attorney General Program at Columbia Law School, and in that capacity I work closely with the men and women who serve as your attorneys general and your staff, all of whom are deeply committed to rooting out fraud in the area of credit. My testimony is obviously my own, but I have discuss it with a number of attorneys general, including your own, Mr. Chairman, Lisa Madigan, and I think I broadly reflect the views of those attorneys general who are committed to this important issue. I think if there is one thing that is clear is that we have insufficient consumer protection in the field of credit. That is the bottom line. We are not doing enough. The crisis is real and it is growing. And if there is one single lesson that has to be received in the halls of Congress and the halls of federal regulators, including the Federal Trade Commission, is that the states got it right and the states got it first.

Speaking bluntly, until we have effective state regulation from state attorneys general and state banking commissioners, we will never get ourselves out of this hole. The question is how do we get from here to there, and that is a challenge. There is a long history of relationships between the federal and state approach to working with these issues. The federal government has a number of very narrow federal statutes enforced by not the Federal Trade Commission but enforced by banking regulatory agencies whose first job is to assure the safety and soundness of the banking community, and we see how well they have done that.

But in addition to that, it is their responsibility allegedly to deal with consumer protection and they just don't do it. It is not their highest priority. It never will. On the state side you have broader laws, state unfair, deceptive and trade practices act, which are flexible, and state attorneys general get it right and get it first not because of—although they show great leadership and great courage they get it because they are structured to do it. They live in communities. Like you, they have constituents. They are able to move and move quickly, and they are able to move on a national basis and on a bipartisan basis so that they are able to achieve some very specific and concrete results.

Now get to the hearing of the Federal Trade Commission. There is a long history between the Federal Trade Commission and the state attorneys general. Sometimes it is very positive. In the 1970s federal funding with the help of the Federal Trade Commission actually went to the states to get states more involved in consumer protection. Again, during the terms of the first President Bush and President Clinton, again we had warm and solid relationships with the Federal Trade Commission and the states were on the same side. The last 8 years have been very cold years. And I commend our new chairman. Our new chairman did the best he could to explain the facts as he found them, but the bottom line is that the Federal Trade Commission has been on the sidelines on a number of very, very important cases, and this is very unfortunate.

Not only were they not involved in the cases but even informally they never called up an attorney general and said what did you learn? What are you seeing about the patterns of fraud? And this is a serious problem. I commend the chairman for reinstituting the Executive Working Group, which I called for in my formalized testimony. It is extraordinarily important. There are some regional directors of the FTC who work with the states, there are some who not. Certainly, the FTC are bringing cases but are these the biggest cases or is the FTC showing an instinct for the capillary. Are they striking at the major issues or are they grabbing onto low hanging fruit when they go after a case? We don't know. We don't know because people are not sitting down in the same work and discussing how do we put together a systematic, sophisticated process by which we can root out consumer fraud, and that requires a lot of work because there will never be enough lawyers in the Federal Trade Commission, never, never, never, to track down the kind of consumer fraud we are seeing.

The FTC has to work with the states, state banking commissioners, the private bar, consumer advocacy groups, in other words, all the people that the states work with every day as they fashion the kind of priority prosecutions that are absolutely necessary to make this happen. Now not only have the states brought the cases that have been alluded to in the earlier testimony, the Household, the AmeriQuest, and the Countrywide, but they had to do it with one hand tied behind their back because they are litigating with the same federal agencies who are trying to pre-empt them from bringing these cases at all. That case is back before the United States Supreme Court again in April. It is a serious issue. The Banking Committee has held hearings on this. It is extraordinarily important that the Federal Trading Commission and the chair of the Federal Trade Commission stand up as has the chair of the FDIC, Sheila Bare, and said this is not a time to pre-empt states. We have a problem. We need more consumer protection, not less, and the timing is of extreme importance. So with that, Mr. Chairman, thank you for giving me this opportunity, and I look forward to answering any questions that you might have.

[The prepared statement of Mr. Tierney follows:]

Testimony of

James E. Tierney
Director of the National State Attorney General Program
Columbia Law School

Before the Subcommittee on Commerce, Trade and Consumer Protection
U.S. House of Representatives Committee on Energy and Commerce

"Consumer Credit and Debt: The Role of the Federal Trade Commission"

Room 2123 – Rayburn Office Building
March 24, 2009

... *''even though you can't see or hear them at all, a person's a person, no matter how small'' Horton Hears a Who, Dr Seuss, (1954).*

I. Introduction

Chairman Rush, Vice Chair Schakowsky, Ranking Member Radanovich, members of the Subcommittee: Thank you for inviting me today to share with you my perspective – and long history with state attorneys general – on the record and role of the Federal Trade Commission (FTC) in relation to consumer credit and debt. This is a particularly welcome discussion, as the credit market was the first domino to fall in the run-up to today's economic crisis.

The short answer to our current situation is that there is – and has for a long while been – insufficient attention paid to meaningful consumer protection, especially at the federal level. In many ways, this is the story of the different roads that the states and the federal government took some time ago. I would like to take this opportunity to fill in that background because it offers lessons for the directions we should take now. Perhaps the most important lesson is that Washington regulators – the FTC and the rest – have a great deal to learn from the states.

We were asked to answer four questions in this hearing:

1. What has been the FTC's record on credit matters?
2. What could it do without increased authority?
3. What could it do without increased authority, but with more resources?
4. What more could it do with more authority?

I will offer some specific ideas about those questions (Section IV), but first I want to put the FTC's current record into historical context. The effectiveness of any regulatory system depends not only on the regulations and the resources, but on the culture of the regulatory institution. There are serious concerns in the case of the FTC and its role as consumer protection watchdog in the area of consumer credit in all three of those areas. But to understand why, it is necessary to understand that historical context.

II. Enforcement

A. Framework

The current crisis of consumer protection in the area of credit and debt did not start last year.

There is a history.

In the summer that I was 22 years old, I walked into my local savings bank to try to get a loan to purchase a 200 year old farmhouse on a Maine country road. Its cost was $9,500. I had borrowed $500 from my younger brother, who was in high school, as a down payment. I was working as a janitor but was going to start teaching junior high school and coaching basketball.

The loan officer sat me down and told me about things I'd never heard – closing costs, title searches, home insurance – and he led me through a maze of forms. I went out and borrowed another $350 from a college friend, signed the forms without reading them and moved my family into the house. It was all mine.

I never had a single doubt about what I did because I knew the loan officer and I knew the bank vice president. He went to my church and his son, Danny, was a friend of my brother and his daughter, Mary, was a friend of mine. He would never have cheated me.

At that time, traditional legal protection for borrowers existed because of state usury laws, state banking commissions, state common law, and state attorneys general, but the real protection came from the culture of trust the comes from personally knowing with whom you are borrowing. The mutual benefits of honest dealing with credit generally and mortgages in particular were clear to entire communities, and therefore to me. We have all seen "It's A Wonderful Life."

Those days are long gone and they were not good for everyone. Entire communities were excluded from credit availability because of race or gender.[1] And today we often do substantial consumer transactions with people we do not know or ever meet.

Economists and lenders accurately point out that the impersonal nature of the transaction significantly reduces transaction costs, lowers the cost of credit and therefore makes credit more widely available. Economists and lenders will never accurately point out that

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[1] Keith N. Hylton and Vincent D. Rougeau, *Lending Discrimination: Economic Theory, Econometric Evidence, and the Community Reinvestment Act*, 85 GEO. L.J. 237, 241 (1996).

the impersonalization is accompanied with a terrible increase in the risk of fraud.[2] To the economist and lender, it is an acceptable trade-off.

To our neighbors and friends, and now to the economy as a whole, it is a disaster.

The impersonalization, therefore, reduces trust even as it increases credit. It also increases the need for regulation. And that is what has brought us together this morning.

As we all assumed more debt over the last thirty years, our access to cheaper credit expanded our economic choices.[3,4] Government regulation was unable to keep up with the changes and the safety of the financial products became increasingly suspect.

Honest players in the credit market found themselves undercut by the less responsible. Many either left the market or joined the race to the bottom. Securitization of the debt took credit products further away from those directly engaged with consumers. Bundled credit products became vehicles for immense short term profits to each stakeholder along the line.[5] Credit sellers thus had enormous incentive to exploit, free of regulation and oversight, consumers' lack of information and their inability to understand these complex products. Credit products become more dangerous. Incentives for fraud proliferated.[6]

The legal theories underlying the extension of credit are those of contract law, and as we all know, Americans fundamentally believe in the freedom of contract. Thoughtful legal theorists and economists, however, have long known that the benefits of the extension of credit in a society can only be realized when consumers are rational and informed. If there is no information or if the information is misleading, or false, or if it is in a

[2] Testimony of Tom Miller, Attorney General of Iowa before the U.S. House of Representatives Committee on Financial Services, *Progress in Preventing Foreclosures*, Nov. 2, 2007, p. 4. (Available at http://financialservices.house.gov/hearing110/htmiller110207.pdf). "Securitization separated the origination of a loan from its consequences by dramatically changing the distribution of risk and incentives for mortgage market participants. This has unfortunately led to weak underwriting and in some instances fraud, and to borrowers being placed in loans they could not afford."

[3] Eric S. Rosengren, President & Chief Executive Officer Federal Reserve Bank of Boston, *Subprime Mortgage Problems: Research, Opportunities, and Policy Considerations*, Speech at The Massachusetts Institute for a New Commonwealth, December 3, 2007, p.2. (Available at http://www.bos.frb.org/news/speeches/rosengren/2007/120307.pdf).

[4] For credit expansion over past 10 years see: Joint Economic Committee United States Congress, *The U.S. Housing Bubble and the Global Financial Crisis: Housing and Housing-Related Finance*, May 2008. (Available at http://www.house.gov/jec/news/Housing%20Bubble%20study.pdf). For expansion of credit over the past 30 years, see Patricia A. McCoy, Andrey D. Pavlov & Susan M. Wachter, *Systemic Risk Through Securitization: The Result of Deregulation and Regulatory Failure*, forthcoming Conn. L. Rev. (2009).

[5] Adam B. Ashcraft and Til Schuermann, *Understanding the Securitization of Subprime Mortgage Credit,* Federal Reserve Bank of New York Staff Reports, no. 318, March 2008 (Available at http://www.newyorkfed.org/research/staff_reports/sr318.pdf).

[6] Testimony of Tom Miller, Attorney General of Iowa before the U.S. House of Representatives Committee on Financial Services, *Progress in Preventing Foreclosures*, Nov. 2, 2007, p. 4. (Available at http://financialservices.house.gov/hearing110/htmiller110207.pdf).

language that cannot be understood or can be changed by the lender at any time, then the promised benefit of credit expansion will not occur.[7]

B. Federal Approach

Over many years, the Congress has passed a series of laws designed to prohibit specific fraudulent, unfair or deceptive practices – the Fair Debt Collection Practices Act,[8] Equal Credit Opportunity Act,[9] the Home Ownership and Equity Protection Act (HOEPA),[10] or to foster informed decision making – the Truth in Lending Act,[11] or to assure accuracy in the credit reporting system – the Fair Credit Reporting Act.[12]

These laws are enforced by federal banking agencies who are in a position to monitor lenders on an on-going basis through routine monitoring and examinations.[13] Because their prime responsibilities are to ensure the safety and soundness of lending institutions, consumer protection will never be the highest priority.[14]

The Federal Trade Commission, by contrast, does not have monitoring and examination authority over depository institutions. Like state attorneys general, with whom it shares enforcement authority over non-depository lenders, it operates under a law enforcement model. That means it acts only after a problem has already gotten big enough to attract notice.

A hands-off regulatory approach and a series of narrowly targeted laws led the industry to act as if they could do anything that was not specifically prohibited. This approach by the federal government allowed credit products to become more dangerous to consumers.[15,16]

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[7] 15 USCS § 1601 "The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this title [15 USCS §§ 1601 et seq.] to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices."
Resolution Trust Corp. v. Martinez, 1994 U.S. Dist. LEXIS 21506 (S.D. Ohio Aug. 24, 1994) "The Truth in Lending Act (TILA), 15 U.S.C. § 1601 et seq., is designed to ensure that consumers can make informed, rational choices regarding the credit transactions into which they enter."

[8] 15 U.S.C. § 1692 (1978).

[9] 15 U.S.C. § 1691 (1974).

[10] 15 U.S.C. § 1639 (1994)

[11] 15 U.S.C. § 1601 (1968).

[12] 15 U.S.C. § 1681 (1970).

[13] Christopher L. Peterson. *Federalism and Predatory Lending: Unmasking the Deregulatory Agenda.* 78 Temp. L. Rev. 1, 73 "The primary mission and long-standing cultural focus of federal depository institution regulators has been monitoring the safety and soundness of their institutions, rather than consumer protection."

[14] Eric Nalder, *Mortgage System Crumbled While Regulators Jousted*, The Seattle Post-Intelligencer, October 11, 2008, (hereinafter "Nalder"). (Available at http://seattlepi.nwsource.com/business/382860_mortgagecrisis11.html).

[15] In an amicus brief written by North Carolina Attorney General Roy Cooper (and signed by 49 states), Cooper notes: "By contrast, the OCC's record of enforcing consumer protection laws against national banks has been described as "relatively lax" and "unimpressive," particularly when compared to the more

The federal laws allowed lending contracts to become more complex and, in the case of credit cards, even to be changed retroactively.[17]

This has made it impossible for consumers to understand their credit documents, which is necessary for self-protection and for rational comparison of competitive credit products. In fact, in both the area of credit cards and mortgages, the Federal Reserve Board has recently admitted that some practices and terms are so complicated that they simply defy comprehensible explanation.

Ironically, providing more and more complex information in impossible to understand language results in consumers becoming less informed about the financial products they are purchasing. The complexity is known to every marketer of consumer products and the result is a confused and manipulated consuming public, and an atmosphere conducive to fraud.[18]

Over the last ten years, the federal regulatory approach has increasingly reflected a deregulatory philosophy. The federal government began to restrict existing governmental resources to root out fraud by cutting back enforcement on the federal level just as it expanded its efforts to preempt enforcement at the state level.[19]

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vigorous enforcement efforts of state authorities. Christopher L. Peterson, Federalism and Predatory Lending: Unmasking the Deregulatory Agenda, 78 TEMP. L. REV. 1, 70-74, 77-81 (2005) (hereinafter "Peterson, Unmasking the Deregulatory Agenda"). As subprime mortgage lending abuses became epidemic, the OCC and other banking regulators were criticized for their slow response. See Edmund L. Andrews, Fed Shrugged as Subprime Crisis Spread, N.Y. TIMES, Dec. 18, 2007, at 1; Greg Ip & Damian Paletta, Lending Oversight: Regulators Scrutinized in Mortgage Meltdown – States, Federal Agencies Clashed on Subprimes as Market Ballooned, WALL ST. J., Mar. 22, 2007, at A1. Former Federal Reserve Chairman Alan Greenspan has acknowledged that federal regulators lack the skills and resources to effectively police the lending industry for unlawful practices. He also observed that the primary law enforcement role in this area should be with state attorneys general. Jane Wardell, Greenspan Defends Subprime Market, ASSOCIATED PRESS, Oct. 3, 2007, available at www.washingtonpost.com/wp-dyn/content/article/2007/10/02/AR2007100200784.html."
(Available at http://projects.newsobserver.com/sites/projects.newsobserver.com/files/cooper-amicus.pdf).

[16] Prepared Statement of Patricia A. McCoy, *Hearing on "Consumer Protections in Financial Services: Past Problems, Future Solutions" before the U.S. Senate Committee on Banking, Housing, and Urban Affairs*, March 3, 2009, at 11-24.

[17] Julia Lane, *Will Credit Cardholders Default over Minimum Payment Hikes?* 18 Loy. Consumer L. Rev. 331, 348 "Credit card issuers typically reserve the right to change the terms of each card for any reason, allowing them to apply higher default rates to balances that existed before the event that triggered the default rate even occurred. ... Because the credit card company has reserved the right to change the terms at anytime, it is not required to notify the cardholder of the retroactive rate. The credit cardholder is left confused, with little recourse, because the OCC has upheld the practice so long as the credit card companies are not intentionally deceiving their customers."

[18] Adam B. Ashcraft and Til Schuermann, *Understanding the Securitization of Subprime Mortgage Credit*, Federal Reserve Bank of New York Staff Reports, no. 318, March 2008, p.11. (Available at http://www.newyorkfed.org/research/staff_reports/sr318.pdf). "[M]any products offered to sub-prime borrowers are very complex and subject to mis-understanding and/or mis-representation."

[19] Robert Berner and Brian Grow, *They Warned Us: the Watchdogs Who Saw the Subprime Disaster Coming - and How They Were Thwarted by the Banks and Washington*, Business Week, October 20, 2008

The federal deference to the myth of a self-correcting market and faith in deregulation were not an accident. They reflected the deliberate policy of the Administration and of many in the Congress. So long as the beneficiaries of the laissez faire regulatory approach continued to provide easy credit to consumers and supersized returns to investors, and so long as home prices and the Dow Jones continued to rise, the public did not complain about the loosening of the regulatory reins.

In the then prevailing political climate, the federal government did little or nothing to engage in preventive consumer protection, or to set a basic floor for fair business conduct. Instead it talked about setting the standards after the fact through "case by case" law enforcement, but rarely followed up. So with no standards up front, and little enforcement on the back end, industry-wide standards of business conduct fell.

C. State Approach

The states followed a different regulatory path. In the 1970s and 1980s, each state passed Unfair and Deceptive Acts or Practices (UDAPs) that were based on a uniform model and allowed state attorneys general, and in most states private litigants, to move against any business practice that they considered to be unfair and deceptive. These laws were analogous to the Federal Trade Practices Act, but did not include many of the federal exemptions. A clear majority allowed state attorneys general to proceed against depository institutions.[20] Until recent federal banking regulatory initiatives state attorneys general had broad, unfragmented jurisdiction. As a result, when credit card banks or mortgage servicing banks teamed up with unscrupulous direct marketers, they could act against both auto dealers and the auto loan lenders to stop unfair and deceptive practices in auto financing.

State attorneys general saw the need for consumer protection in the area of credit.

They got it first.

And they got it right.

The attorneys general got it first and got it right not because of attorney general leadership – although there was a great deal from both the attorneys general and their staffs on a bi-partisan basis – but because they are structured to respond quickly and effectively.

Attorneys general are able to put together working groups and investigate immediately shortly after receiving complaints. As elected officials, they have a public forum which they can use to get results quickly – results that often have national implications.

[20] 15 U.S.C. § 41-58 (2006).

D. Contrast Between State and Federal Approaches

During the late 1970s cooperation between the attorneys general and the Federal Trade Commission was extraordinarily high.[21] The FTC and the attorneys general worked on the same side of the table. The FTC urged states to pass strong consumer protection statutes and engaged in training and litigation support to empower state consumer protection. The capacity of state attorneys general to fight consumer fraud was made possible by direct federal funding through the Law Enforcement Assistant Agency (LEAA).

This cooperation disappeared overnight with the election of President Reagan. This led to the appointment of David Stockman as head of the OMB, who attempted to impound federal monies already sent to state attorneys general, and James Miller as head of the FTC, who not only stifled the FTC, but regularly tried to prevent the states from filling the void in consumer and antitrust.[22]

The lack of cooperation was overt. FTC Chair Miller would join us at meetings of the National Association of Attorneys General and attack our efforts at consumer protection. He was hostile to the attorneys general and we were hostile right back. Under Miller's leadership, the FTC would regularly appear in opposition to consumer protection initiatives by state attorneys general.

Positive cooperation between the attorneys general and the FTC was reestablished with the appointment of Janet Steiger to the Chair of the FTC by President George H.W. Bush. Her successor, Robert Pitofsky, who was appointed by President Clinton, continued cooperation with the attorneys general.

This cooperation consisted of a formal Executive Working Group (EWG) wherein the FTC, the U.S. Department of Justice, and state attorneys general would meet and consult

[21] Benjamin S. Sharp, Deputy Director, Bureau of Competition, Federal Trade Commission, *Innovative Relief and Class Action Issues in Government and Private Actions: FTC Antitrust Remedies: In the Classic Tradition.* 50 Antitrust L.J. 83 "The parens patriae law has spawned a growing number of lawsuits brought by state attorneys general to recover damages on behalf of citizens of their states as a result of overcharges by antitrust violators. Several FTC actions have been followed by such state suits. In the *Levi Strauss* litigation, which was sparked by an FTC consent order against the jeans maker's resale price maintenance policy, ten state suits have produced a total settlement of almost thirteen million dollars. In the *Binney & Smith* matter, which involved a Commission investigation of horizontal price fixing by several art supply firms, eleven states have filed suit. The Commission has a policy of full cooperation with state attorneys general in disclosing its evidentiary files. This policy has been upheld by federal courts as within the Commission's discretion."

[22] Roger Slade, *The Second Circuit Review -- 1984-1985 Term: Antitrust: Federal Obstruction of State Antitrust Enforcement: The Second Circuit Finds no Place For State Participation in the Fast World of Mergers.* 52 Brooklyn L. Rev. 591, 593 "State efforts to increase their antitrust enforcement presence suffered a serious setback ... in *Lieberman v. FTC.* The litigation was prompted by the FTC's revised interpretation of state law enforcement's role in the premerger review process. In contrast to the Commission's well-established policy of sharing premerger information with state governments, the FTC suddenly began to deny requests made by state attorneys general to inspect premerger information."

on priorities, policy and cases. It also consisted of daily communication between FTC staff and state Assistant Attorneys General working on specific cases.

There was again the presumption that the FTC and the attorneys general would be on the same side.

III. History of State and FTC Enforcement

A. FTC Cases: Associates

In 2001, after several years of investigation, the FTC took significant action against one of the top subprime lenders. The Associates First Capital Corporation and Associates Corporation of North America ("Associates") had a long and notorious record of predatory lending violations and the matter was settled by the FTC in the Fall of 2002 for the largest amount ever received by the Commission in a consumer protection matter. (Associates was purchased by Citigroup during the investigation.) Initially, the FTC's case took aim at what was a fundamentally unfair business model to lure people into a trap of high cost loans, and then made it very hard for them to walk away. The settlement by the FTC focused on just one aspect of it: insurance packing. The $215 million was distributed according to the FTC to "as many as two million consumers." Citigroup made significant changes in the practices that had been followed by Associates.

While successful, the 2002 settlement was the last case against a significant national mortgage originator handled by the FTC.[23]

B. Attorneys General Cases: Household, Ameriquest, Countrywide

Household International

Almost simultaneously with the FTC's Associates action, the other top subprime originator of the time, Household International, was the focus of a joint investigation by state attorneys general and state financial institutions regulators.[24]

The investigation and settlement effort was led by Attorneys General Tom Miller (Iowa), Roy Cooper (North Carolina), Christine Gregoire (Washington), and New York State Banking Superintendent Elizabeth McCaul, along with staff from several other states. Ultimately, all 50 states joined. The case, settled on October 11, 2002, was according to Miller, "the largest direct restitution amount ever in a state or federal consumer case,"[25]

[23] Since then, the FTC has taken positive action against national players. See Fairbanks in 2003 (http://www.ftc.gov/opa/2003/11/fairbanks.shtm) and EMC in 2008 (http://www.ftc.gov/opa/2008/09/emc.shtm)
[24] For a general description multistate litigation see: Jason Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 Colum. L. Rev. 1998 (2001).
[25] *States Settle With Household Finance: Up to $484 Million for Consumers.* Iowa Office of the Attorney General Press Release, October 11, 2002. (Available at http://www.iowa.gov/government/ag/protecting_consumers/2002_news/10_11_2002.html).

bringing nearly half a billion dollars ($484 million) in financial relief to Household borrowers.
The settlement also provided significant injunctive relief, limiting front points, origination fees, prepayment penalties, and "piggyback" second mortgages, and requiring additional loan disclosure.

A review of the Household case reveals a state-based philosophy that is different from that of the federal government. The settlement prohibitions are grounded in basic consumer law rather than in violations of technical federal or state banking regulations.

Household showed that attorneys general are able to initiate cases in the area of credit fraud because they operate under flexible state UDAP statutes.

Ameriquest

While the1998-2002 subprime market leaders Associates and Household were defending federal and state law enforcement actions, a different kind of subprime lender business model moved rapidly up to number one market share in 2003-2005: Ameriquest.

Ameriquest became by far the leading and most prominent subprime lender with twice the assets of its next competitor.[26]

The attorneys general were not deterred by industry and federal government accusations of being activist. They were not deterred by the intense lobbying by the defendant and trade associations to which it belonged.

Ameriquest settled with a bi-partisan group of attorneys general for $325 million and for a host of changes to their fraudulent lending practices, including wholesale misrepresentation of contracts, negotiating technical lending documents with Hispanic lenders who could not speak or read English, and making secret deals with allegedly "independent" appraisers who would over inflate or simply misrepresent real estate values to subprime borrowers. [27]

Again, the case was investigated and settled by the attorneys general and state banking regulators. Again reforms were achieved. Again the federal agencies were silent.

Although the largest subprime lender signed an extraordinary settlement document and disappeared from the marketplace, it was clear to the attorneys general that official Washington simply did not want to blow the whistle on the fraudulent lending practices that were sweeping the country.

With the top market share of subprime originators for every year between 1998 and 2005 having been found to have engaged in large-scale unfair and deceptive acts and practices,

[26] Mike Hudson and E. Scott Reckard, *Workers Say Lender Ran 'Boiler Rooms,'* Los Angeles Times.
[27] Ibid., Alex Veiga, Attorneys General Hail $325 Million Settlement With Ameriquest, Jan. 26, 2006, Associated Press.

either by the FTC (Associates) or the states (more on Associates, Household, Ameriquest) it would have been logical for Washington to be asking questions about this industry. But the industry continued to either pass these actions off as aberrations or to attribute the actions to overzealousness by the states, rather than looking in the mirror. Instead, they warned Washington that this attitude would "impede access to credit" and take away the American dream. Congress took no legislative action.[28] However, the Senate did take action when it confirmed the sole owner of Ameriquest to be our Ambassador to the Netherlands. [29]

The state attorneys general continued to work on these issues. They formed the State Foreclosure Prevention Working Group and publicly predicted the potential of a million foreclosures. The Group continues to meet and explore settlements and mediations with servicers and other stakeholders.[30] Most attorneys general are now fully engaged in consumer education, and in litigation concerning credit fraud violators that fall within their jurisdiction.

Countrywide Financial Corporation

Just last year, the cycle repeated again when state attorneys general investigated and settled with the Countrywide Financial Corporation. [31]

In 2007, Countrywide had become the largest prime and subprime mortgage lender in the country. Attorneys general around the country began to receive numerous complaints as to Countrywide's lending practices. When it appeared that Countrywide's sale to the Bank of America was about to close and allow Countrywide to escape state jurisdiction as the result of the OCC's preemption initiative, the California and Illinois Attorney General's Offices filed suit alleging that Countrywide had "engaged in a wide range of deceptive practices" and "originated loans with little or no regard to borrowers." [32] These practices included inappropriate loosening of underwriting standards, insufficiently disclosed "teaser" interest rates as low as 1% and a host of highly complex loan products inappropriate for homeowners.

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[28] Former Rep. Sue Kelly (R-NY) convened a hearing on January 28, 2004 and asked for the OCC to delay implementation of the OCC's preemptive rules pending a full Congressional review. Her request was denied by the Comptroller of the Currency. Congressional Review of OCC Preemption: Hearing Before The Subcommittee on Oversight and Investigations of the H. Comm. on Financial Services, 108th Cong. (2004). But see: Remarks of Cong. Oxley (R- Ohio): "the OCC regulations represent a thoughtful attempt to codify and harmonize past legal precedents, and there are many, and regulatory guidance into a coherent framework for resolving conflicts between federal and state laws as they apply to national banks."

[29] Jonathan Peterson, *Senate Confirms Ameriquest Founder as Ambassador*, February 10, 2006, Los Angeles Times.

[30] *States' Foreclosure Prevention Working Group Produces First Report on Mortgage Servicers' Loss-Mitigation Performance.* Iowa Office of the Attorney General Press Release, April 22, 2008. (Available at http://www.iowa.gov/government/ag/latest_news/releases/feb_2008/Foreclosure_prevention.html).

[31] *Miller: AGs Reach Agreement with Countrywide Financial that Will Help Almost 400,000 Borrowers Facing Foreclosure.* Iowa Office of the Attorney General Press Release, October 6, 2008. (Available at http://www.iowa.gov/government/ag/latest_news/releases/oct_2008/Countrywide.html).

[32] Testimony of Illinois Attorney General Lisa Madigan, House Committee on Financial Services, March 20, 2009, p.3.

Iowa Attorney General Tom Miller, the lead counsel in both the Household and Ameriquest settlements, once again convened a multistate negotiating team that worked with the California Attorney General Jerry Brown and Illinois Attorneys General Lisa Madigan that and resulted in a global settlement. Announced on October 6, 2008, Countrywide (now owned by Bank of America) agreed to commit an extraordinary $8.7 billion in direct loan relief, which will cover approximately 400,000 borrowers. In addition, Countrywide will give $150 million to a foreclosure relief fund that will help borrowers facing late payments and foreclosures.

Unlike the Household and Ameriquest settlements, the Countrywide settlement did not focus on banning particular lending practices, which were by 2008 arguably preempted, and instead focused on mortgage modification programs, including the waiver of fees, to allow owners to stay in the homes.

C. Lessons Learned

Attorneys general have consumer protection divisions that gather consumer complaints on a daily basis. While the 5 federal agencies also collect consumer complaints, there are 51 state attorneys general. Attorneys general and their staffs operate in a bipartisan manner and their staffs talk to each other. Attorneys general and assistant attorneys general have phone numbers that are listed.[33] They live in impacted communities. They see the problems sooner, and they see the consequences sooner. Their neighbors and the relatives of their neighbors are the ones affected.

It is the structure of the state attorneys general that led to Household. When the problems with Household began, consumer fraud phone lines lit up in attorney general offices and advocates, such as AARP, walked in the door. Attorneys general reached out to their state regulators who joined the working group. When companies such as Household lied in their defense – the usual "rogue office" defense for example – state attorneys general were able to quickly uncover the lies and strike a settlement.[34]

Now it is clear to everyone that consumer protection is not a drag on the credit business. It is vital to the health of that business, and to the health of the economy. We hope that Congress will keep in mind that those closest to the impact may have the best view. For Congress, that means that baseline consumer protection should be just that – baselines. Misguided efforts for broad preemption cannot be allowed to stop states from dealing with problems when they arise.

[33] Attorneys general and their staff regularly participate in training under the auspices of the National Attorneys General Training and Research Institute (NAGTRI) and the National State Attorney General Program at Columbia Law School. http://www.stateag.org
[34] Sally Peacock, *How the Household Settlement Uncorked a Law Enforcement Bottleneck*, December 2002. (Available at http://www.law.columbia.edu/center_program/ag/Library/studentpapers).

Federal agencies, supported by the banks who fund them, and who opposed state scrutiny, continue to litigate in the courts to preempt invaluable state consumer protection.

The attorneys general are continuing to fight a two-front battle to protect consumers. On the one hand, they are litigating against the perpetrators of fraud.[35,36] On the other hand, they are battling federal agencies all the way to the U.S. Supreme Court to maintain their traditional jurisdiction over federally chartered lending institutions. Next month, in Cuomo v. Clearinghouse, the U.S. Supreme Court will again hear arguments on the extent of state jurisdiction this time over their ability to investigate racial bias in lending.[37] Yet again, the attorneys general are battling the federal government and the lending industry.

IV. Four Questions

The issues at today's hearing are four:

1. What has been the record of the FTC on credit matters?

The Federal Trade Commission possesses an extraordinarily broad mandate in the area of consumer protection even as it has been forced to operate with decreased resources. The FTC is further hampered by limited jurisdiction when addressing credit issues arising from depositary lenders.

Although there has been some increase in staff allocation to credit matters in the last few years, the truth is that the number of bodies available to this issue within the FTC is miniscule when compared to the seriousness of the problem. It is for this reason that I applaud the Committee for convening this hearing. Clearly the FTC needs support in its effort to protect consumers if it is to take a leadership position on credit fraud.

That being said, I do believe that the FTC could have done more with what it has. For instance, after the Associates settlement in 2002, the FTC brought no new major enforcement actions for abusive mortgage origination during the remainder of the housing bubble.[38] Instead, it simply called on consumers to "educate themselves" despite rampant fraud and hopelessly outdated disclosures.

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[35] Testimony of Illinois Attorney General Lisa Madigan, House Committee on Financial Services, March 20, 2009, p. 5-6. See also: *Commonwealth v. Fremont Inv. and Loan*, 897 N.E. 2d 733 (Mass. 2008)
[36] Testimony of Sarah Raskin, Maryland Commissioner of Financial Regulation before the U.S. House of Representatives Committee on Financial Services, *Federal and State Enforcement of Financial Consumer and Investor Protection Laws,* March 20, 2009.
[37] *Cuomo v. Clearing House Association* (2009).
[38] See FTC Subprime Lending Cases (Since 1998), available at http://www.ftc.gov/opa/2002/07/subprimelendingcases.shtm. The only major subprime lending case initiated by the FTC since 2002 was against Fairbanks Capital Corporation, for servicing abuses.

Similarly, the leadership of the FTC, especially during the critical years of 2002 to 2007, never sat down with those who were at the forefront of battling credit fraud in order to establish enforcement priorities. The FTC leadership did not meet with attorneys general, state banking regulators and other advocates to learn from them and to set a coordinated strategy. In the aftermath of the Household, Ameriquest and Countrywide settlements, the FTC never reached out to the attorneys general or their staffs to share the lessons of the experience.

Attorneys general and their staffs repeatedly have told me that they cannot understand why the Executive Working Group (EWG), which consisted of the FTC, the U. S. Department of Justice and the attorneys general, no longer meets. They cannot understand why traditional federal state training has been reduced.

The fact is that the previous leadership of the FTC isolated themselves from their natural allies – state attorneys general – and no one can understand why.

2. What more could it do without increased authority?

The first step, which appears to already be underway, is for the FTC to shift its resources to financial and credit fraud. The Chair is to be commended for that approach.

The second step is to reestablish the Executive Working Group. Sometimes old ideas are good ones, and a formalized relationship with attorneys general is essential. The leadership of the FTC has to get out of Washington and meet with state leaders.

It would also be advisably for the FTC to meet regularly with consumer advocacy organizations and representatives of the private bar who regularly bring consumer class actions under state consumer laws.

It is therefore my position that before any additional authority over credit is given to the FTC, it should make a commitment to broaden its horizons. It should listen to more people. The majority of the FTC has been drawn from the antitrust bar of large law firms. It is an organization immersed in the culture of the Beltway. Unlike those of you on this committee and every attorney general, the FTC does not have to face constituents or live in impacted communities. The FTC must begin to work with all stakeholders.

On March 3, 2009, Sheila Bair, the FDIC Chairman, stated in a speech before the National Association of Attorneys General (NAAG) that, "if ever there were a time for the states and the feds to work together, that time is right here and now. The last thing we need is to preempt each other."[39]

This clear statement has gone a long way to enhance both communication and cooperation among attorneys general, state regulators and the FDIC. It is very important

[39] Speech before the National State Attorneys General, March 3, 2009, Washington, D.C. http://www.fdic.gov/news/news/speeches/chairman/spmar0309.html

that the Chair of the FTC join the Chair of the FDIC with a public statement so that the specter of preemption can be taken from the table in the FTC's future work with state attorneys general.

3. What more could it do without increased authority but more resources?

The FTC should have more staff, but that will not solve the problem. It should learn to leverage other entities that are on the same side.

In this respect, Congress, too, could recognize that this is an area in which it has been complicit. It is a simple truth is that there will never be enough public resources to address all the abuses in the marketplace. The concept of the private attorneys general – which recognized and allowed consumers the right and ability to vindicate their own legal rights – is vital and has proved highly successful in the states. Too often, the ill-conceived idea that lawyers who represent real people with real rights are simply "greedy lawyers" from whom business must be protected simply makes it easier for those engaging in bad practices in the business sector to escape accountability.

4. What additional could it do with more authority?

At the present time, there is no federal agency that has the necessary mandate to protect consumers in matters of credit. Existing federal agencies are primarily responsible for the safety and soundness of the institutions that they regulate. Consumer protection will never be their first priority. While the FTC is the primary consumer protection agency of the federal government, it clearly lacks the jurisdiction, resources or culture to assume that task without a significant change in policy.

There has been speculation that the FTC will become the new agency to regulate credit issues along the lines of the recently introduced Durbin/Delahunt proposal.[40,41,42] I have no position on that legislation, but I would oppose increasing credit authority to the FTC unless it becomes significantly more integrated with others with similar concerns.

The new rulemaking authority granted to the FTC is a positive step. Consistent with my earlier remarks, it is important that this new authority be used carefully and in conjunction with other stakeholders. This welcome change has wisely freed the FTC from antiquated rulemaking procedures. The FTC is now poised to quickly establish proactive, *ex ante* rulemaking on credit related issues. I believe that it is vitally important

[40] A recent law article by Elizabeth Warren provides both important analysis and an interesting proposal on reforming federal oversight of credit instruments. See: Warren, Elizabeth & Oren Bar-Gill. "Making Credit Safer," 157 *University of Pa. Law Review* 1 (2008).
[41] Prepared statement of Professor Patricia McCoy, University of Connecticut School of Law, hearing on "Consumer Protections in Financial Services: Past Problems, Future Solutions" before the U.S. Senate Committee on Banking, Housing, and Urban Affairs.
[42] Kara Scannell, *Democrats Propose Bill to Create New Financial Products Regulatory Agency,* March 10, 2009. (Available at http://online.wsj.com/article/SB123672634863188481.html?mod=googlenews_wsj)

for the FTC to invite the attorneys general, state banking regulators and other advocates into the rulemaking process. Such a step will significantly improve the likelihood that the attorneys general will enforce those rules in federal court.

V. Conclusion:

As the Director of the National State Attorney General Program at Columbia Law School, I spend virtually all of my time with attorneys general and the men and women who work in their offices. As a participant and observer of state law enforcement for thirty years, I believe that the leadership efforts of state officials in the area of credit fraud contain valuable lessons for us all.

Although still forced to battle federal agencies who are litigating to limit their authority, I continue to believe that a positive federal and state consumer protection partnership is the most effective way to protect our citizens from fraud. I hope that the FTC will take a lead in bringing that partnership to fruition.

I want to close by again thanking the Committee for inviting me to present my views and look forward to responding to your questions.

Mr. RUSH. Thank you. The chair now recognizes Mr. Christopher Peterson. Mr. Peterson, you are recognized for 5 minutes.

TESTIMONY OF CHRISTOPHER PETERSON

Mr. PETERSON. Thank you, Mr. Chairman, ranking member. It is an honor to be here today and share a few thoughts. I would like to start with two quick statistics, if I could, about the sub-prime and alternative mortgage product crisis. The first is roughly 6 million foreclosures coming through the pipe according to Credit Suisse, and then foreclosure rescue scam cases brought by the Federal Trade Commission, 6. According to their testimony in the Senate last month, they brought 6 foreclosure rescue scam cases for 6 million foreclosures. That is 1 in a million. Where I come from that is sort of a cliche you talk about when you said he is not doing anything, right? In my view, honorably, the Federal Trade Commission is a good agency that does their best but they are not doing anything. We are talking about taking teacups of water out of an ocean. It is just not even close to the sort of magnitude of problems that we are talking about.

And so if I could just quickly, you talk about the rule of the law. We all have been talking about all these generalizations about separating good loans from bad loans. Just talk about the laws for a second. There is equal credit—they have four titles of the Consumer Credit Protection Act, and then they have their deceptive trade practices authority. The Equal Credit Opportunity Act is designed to prevent discrimination in awarding credit. It doesn't do anything in the way of preventing bad loans from being made. The Fair Credit Reporting Act tries to clear up inaccurate credit information, but that is not the problem that we had here. Lots of people had prime credit histories and were still getting non-amortizing loans that have gone in waves into foreclosure.

The Fair Debt Collection Practices Act is a nice gesture but it generally doesn't apply to home mortgage loan servicers and it comes too late. I mean at the point where the loan is already in default and there is debt collection problems, it is too late at that point. Then the Truth in Lending Act is a nice idea but it is too late. The disclosures are confusing. People generally just don't read them. They ignore the disclosures. And even if that was a great strategy the statute that is designed to promote honesty in origination of loans doesn't apply to mortgage brokers who are the people that actually talk to consumers. What sort of a truth in lending idea doesn't apply to the people who talk to the borrower?

And then in addition to those four statutes, they also have two significant regulations that they have done under their deceptive trade practices authority. The holder in due course notice rule which doesn't apply to home mortgages, and that was back in 1975 and it has never been updated. And, second, the credit practices rule which bans about 5 different problematic contractual provisions including confessions of judgment and pyramiding late fees, but it hasn't been updated since 1984. And this regulation doesn't talk about any of the non-amortizing products and sub-prime products that we are talking about in the past few months.

And that is it. I just did it. In 3 minutes I summed up their entire regulatory structure, and it really doesn't do much of anything to try and prevent home mortgage fraud. And what are the barriers that prevent more stuff from taking place? Well, it is true that they have this inefficient regulatory rulemaking process, and it seems to me it would be helpful to speed that up. But the real problem is the fragmented federal regulatory system. On my hand I can count 11 different agencies that are supposed to be dealing with this problem, the Federal Reserve Board of Governors, the Office of the Comptroller, the Office of Thrift Supervision, FDIC, the National Credit Union Administration, the new Federal Housing Finance Administration, if I am getting that right, the new OFHEO, HUD, SEC, the FBI and Justice at the same time, and then finally the Federal Trade Commission.

In this fragmented system, the capital flows to the weakest regulator like water going down into the basement. And the result is that there is very, very little actual rulemaking to try and deal with the problematic practices that are actually in our industry. So I have been coming up with a list of all the things that I think needs to get done, and I have this gigantic list of problems in our statutory system. It is a big list. We are talking a lot of changes that need to be made. Congress could do that but it is going to be a long and complicated bill. It is going to be very controversial. You could give it to a federal agency to try and do it but which one would you choose? The only plausible existing candidates are the Federal Reserve, which already have that authority under the Home Ownership and Equity Protection Act or the Federal Trade Commission, which is a good choice but has nowhere near the resources and has a too expansive mission.

In my view, respectfully, it is time for a new regulatory agency that deals exclusively with this issue and has authority to pursue protection of consumers on consumer finance issues. And if you are not talking about that, if you are just talking about more tinkering then you are just kind of kidding yourself and you are not really going to fix anything.

[The prepared statement of Mr. Peterson follows:]

S.J. QUINNEY
COLLEGE OF LAW
THE UNIVERSITY OF UTAH

One hundred and eleventh

Congress of the United States

House of Representatives

Committee on Energy and Commerce

Subcommittee on Commerce, Trade, and Consumer Protection

Hearing on Consumer Credit and Debt: The Role of the Federal Trade Commission in Protecting the Public

Written Testimony
of
Christopher L. Peterson
Professor of Law
University of Utah

Tuesday, March 24, 2009

It is an honor to appear today before this Committee. Thank you for the opportunity to share some thoughts on the consumer protection role of the Federal Trade Commission in the area of consumer finance. My name is Christopher Peterson and I am a law professor at the University of Utah where I teach commercial and consumer law classes. I commend you, Mr. Chairman, Ranking Member Radanovich, and other members of the Subcommittee for organizing this hearing and for providing an opportunity to discuss this important and timely national issue.

As you know, our country is currently suffering from the worst financial crisis since the Great Depression. This crisis has its origins in the subprime and alternative home mortgages that were packaged into securities and used as references in risky derivative transactions. While in past years, consumer advocates have criticized financial services companies for engaging in predatory lending, it has become increasingly clear that something more complex is responsible for our current predicament. Rather, "*predatory structured finance*" has simultaneously undermined the well-being of two separate groups: homeowners that relied on unrealistic subprime and alternative mortgage loans and investors that purchased securities drawn from or in reference to these loans.[1] By linking two distinct classes of sometimes unsophisticated consumers, employees at a series of financial intermediary companies had the opportunity to extract lucrative fees, commissions, and bonuses. It is now apparent that many financial services companies held little regard for whether borrowers could successfully repay their mortgage loans or whether investments drawn from those loans would pay out on time.

[1] Christopher L. Peterson, *Predatory Structured Finance*, 28 CARDOZO L. REV. 2185 (2007), *available at:* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=929118.

Unfortunately, federal financial regulators, including the F.T.C., were caught flat-footed by the increasing complexity and stunning breakdown in market efficacy associated with the subprime mortgage crisis. The American public is anxious for reform of consumer financial services both to stabilize our economy and also to promote fairer, more transparent, and safer use of credit. In my testimony I will discuss (1) why existing Federal Trade Commission (F.T.C.) regulations did not prevent the subprime mortgage crisis; (2) the barriers to more effective F.T.C. regulations and the problem of fragmented federal consumer finance regulation; and (3) the need for comprehensive reform in order to stabilize financial markets and restore consumer confidence.

I. Existing Federal Trade Commission Credit Regulations and Enforcement Are Insufficient to Deter Predatory Structured Finance

While the foreclosure crisis was caused by a complex set of factors, the core problem was that subprime market mortgage loan brokers and originators had fundamentally inefficient incentives. Once a market for private label residential mortgage backed securities developed, these companies obtained compensation from closing costs and the proceeds of selling loans to secondary market participants, who in turn, sold them to investors. Generally speaking, the more loans originated the more money the broker or originator made. Similarly, other things being equal, the larger the loan, the higher the commissions, closing costs, and sale proceeds that a broker or originator earned. These simple facts created strong short term incentives for brokers and originators to cut corners in the underwriting process—leading to a dangerous and sometimes fraudulent disparity between company policies and company practices. It also created an incentive for brokers and originators to encourage consumers to borrow more money than they could afford. And, in order to facilitate as many loans with the largest principal possible a large volume of loans, brokers and originators had an incentive to put tremendous pressure on appraisers to value homes at higher and higher prices. It is likely that this is the process that inflated the home value bubble.

For its part, the F.T.C. has enforcement responsibilities relating to four major titles of the Consumer Credit Protection Act (including Equal Credit Opportunity, Fair Credit Reporting, Fair Debt Collection, and Truth-in-Lending), plus its responsibilities for preventing unfair and deceptive trade practices under the Federal Trade Commission Act. Unfortunately, none of these statutes, nor the F.T.C.'s deception and unfairness regulations have provided any meaningful hindrance to predatory structured finance of home mortgage loans.

A. F.T.C. Responsibilities under the Consumer Credit Protection Act

The Equal Credit Opportunity Act was adopted to facilitate equal access to credit for groups that had been denied loans in much of American history. While this is, of course, an indispensible statute, the current crisis is associated with too much unaffordable credit, rather than the discriminatory denial of credit to those that qualify. So far, neither the F.T.C. nor other public or private litigants have been able to use the ECOA to prevent socially destructive subprime or non-amortizing loans to prime borrows.

Moreover, the Fair Credit Reporting Act does not give the F.T.C. tools that would change the fundamentally misaligned incentives of brokers and lenders that originate mortgages for resale as private-label residential mortgage backed securities. As you know, this statute provides consumers rights to help them maintain accuracy in credit reports. One might have hoped that maintaining accurate credit reports would have helped a stable preponderance of consumers obtain less expensive loans with repayment terms more resistant to foreclosure—but this has not been the case. Many of the loans facilitating the foreclosure crisis have such unrealistic repayment terms or were made to those that could not realistically repay them, that more accurate credit reporting information would not have averted default. Indeed many of the borrowers that have defaulted on non-amortizing mortgage loans with introductory interest rates were prime borrowers with solid credit histories. Mortgage brokerages, lenders, investment banks, bond insurance companies, hedge funds, and their employees developed structured finance techniques and corporate compensation plans that allowed them to handsomely profit irrespective of the propensity of borrowers to repay.

The Fair Debt Collection Practices Act was not designed to prevent formation of ill-advised mortgage loans. While the statute admirably attempts to prevent abusive and deceptive collection by third party debt collectors, mortgage loan servicing companies are exempt from the statute provided that they obtain servicing rights on a loan prior to default. Moreover, even if debt collection remedies could deter formation of ill-advised loans, the F.T.C. lacks the resources to bring a sufficient number of cases to established meaningful deterrence. Since 1999, the F.T.C. has brought 21 lawsuits against debt collectors for violating the FDCPA.[2] While these suits are an important national service, the F.T.C. simply has nowhere near the sort of resources needed to create meaningful deterrence for widespread misbehavior of mortgage loan servicers.

The Federal Trade Commission also has enforcement responsibly under the Truth in Lending Act for non-depository institutions. The Truth in Lending Act was designed to assist consumers in shopping for the most advantageous credit. However, time has demonstrated that

[2] Prepared Statement of the Federal Trade Commission on "Consumer Protection and the Credit Crisis" before the Senate Committee on Commerce, Science and Transportation, February 26, 2009, at 12.

the disclosure approach to addressing credit abuses has only very limited usefulness—at least as it is currently conceived. Consumers are presented with information they do not understand, that does not present much of the most important information at a time when the borrower is already committed to a transaction. TILA's damage awards have not been updated to reflect inflation in generations. Truth in Lending information is presented separately and at different times from closing cost information provided under the Real Estate Settlement Procedures Act. And, perhaps most ironically, the statute that purports to promote truth in consumer finance does not even apply to the businesses that most commonly actually *speak* to mortgage loan applicants: mortgage brokers.

B. F.T.C. Responsibilities Under the Federal Trade Commission Act's Deceptive and Unfair Trade Practices Prohibition

At the core of the Federal Trade Commission's consumer protection mission is its responsibility to identify and prevent deceptive trade practices under the Federal Trade Commission Act. Here, the F.T.C. has currently only adopted two regulations which might have provided some deterrence to predatory structured finance of home mortgages. Most notably, in 1975 the F.T.C. adopted its Preservation of Claims and Defenses Regulation, more commonly known as the F.T.C. Holder-in-Due-Course Notice Rule. Under traditional state commercial law, lenders and their assignees could use the longstanding holder-in-due-course doctrine to "cleanse" assigned negotiable instruments of a borrower's claims and defenses against the original lender. But, under the F.T.C.'s regulation, where a loan finances consumer goods or services, it is a deceptive trade practice to assign a loan contract that does not include contractual language eliminating the negotiability of the document memorializing the agreement. This prevents the secondary market owners of loans financing consumer goods and services from asserting the holder-in-due-course defense. Unfortunately, with the possible exception of home improvement loans, the F.T.C. has never applied the holder-notice rule to home mortgages. Now foreclosing trusts that own home mortgages loans on behalf of investors routinely assert the holder-in-due-course doctrine against homeowners attempting to show fraud or other consumer protection law violations in the origination of their loan. The result: even if a broker or lender committed fraud in originating the loan, this fact will generally be irrelevant in a foreclosure proceeding. Although the home mortgage market now has many of the characteristics of the retail installment and automobile finance markets that justified the original holder notice rule, the F.T.C. has not attempted to expand the scope of this regulation. Currently, secondary market purchasers of home mortgage loans have limited or no potential liability for malfeasance of brokers and originators—and thus have little incentive to police the behavior of their business parners.

Second, in 1984 the Federal Trade Commission adopted a "Credit Practices Rule" which bans the use of a few credit contract terms deemed unfair or deceptive. In particular, the regulation prohibits confession of judgment clauses, waiver of statutory borrower exemption laws, assignments of wages, non-possessory security interests in some household goods, and pyramiding of late fees. While these are surely useful rules, the credit industry has long since found effective substitutes. For example, mandatory, binding, pre-dispute arbitration clauses in boiler plate contracts now force many borrowers into expensive, secret, private justice systems that are designed to favor creditors. Similarly, in many states "payday" loan companies use a borrower's personal check in offering loans with average interest rates of about 450% per annum—quite effectively substituting for a wage assignment. With respect to the foreclosure crisis, the F.T.C. has not updated its credit practices rule to ban any of the mortgage loan terms and compensation systems that caused the creation of so many millions of ill-advised loans.

II. The Federal Trade Commission is Hamstrung by a Byzantine Rulemaking Procedure and has Suffered From Passive Leadership on Finance Issues

In the de-regulatory spirit of the early 1980s Congress amended the Federal Trade Commission Act to make it more difficult for the F.T.C. to adopt new regulations than most other administrative agencies. Section 15 U.S.C. § 57a requires that the F.T.C. engage in a more extensive series of proposed rule-making notices than other agencies. The F.T.C. is also required to provide hearings with cross examination rights to interested parties and it is required to conduct both preliminary and final cost benefit analyses of any proposed rule. Since these procedural hurdles were erected, the Federal Trade Commission has not consistently responded to rapid changes in consumer financial services. Particularly in the complex and evolving mortgage securitization markets, the F.T.C.'s cumbersome rulemaking process likely hindered an effective response to predatory structured finance.

Furthermore, a discussion of the F.T.C.'s ability to respond to consumer finance challenges cannot be complete without pointing to the fragmented federal consumer finance regulatory system. The F.T.C. shares consumer finance regulatory responsibility with Federal Reserve Board of Governors, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Federal Finance Agency (formerly Office of Federal Housing Enterprise Oversight), Housing and Urban Development the Securities Exchange Commission, Federal Bureau of Investigation, and the Justice Department. I am aware of no other western democracy that so aggressively pits administrative agencies against each other on such an important sector of its economy.

In recent years, there can be no serious doubt that the result of these complex overlapping jurisdictions has been a race to the bottom in terms of consumer protection. Capital has flowed into institutions that are overseen by the least aggressive federal regulators. Because this hearing is on the subject of the Federal Trade Commission, it is within the scope of today's subject matter to share my view that the F.T.C., while limited in resources and authority, has been a more aggressive enforcer of consumer protection law than the Office of the Comptroller, the Office of Thrift Supervision, or the Federal Reserve Board of Governors. Indeed the O.C.C. and O.T.S., in particular have actively sought to prevent the application of state consumer protection law to the institutions they charter, and have replaced those state laws with minimal regulation and half-hearted enforcement.

This being said, it is clear the F.T.C. could have done more to protect consumers and stabilize the economy. By virtually all accounts, two of the most problematic actors in originating mortgage loans have been independent, non-depository mortgage brokers and real estate appraisers. Neither of these types of businesses fall outside the scope of F.T.C. jurisdiction. And yet, the F.T.C. has not attempted to impose new regulations on deceptive practices in mortgage loan brokering, nor deceptive practices in real estate appraisals. Even with the procedural hurdles the F.T.C. faces in adopting new regulations, one would hope that sufficient evidence of mortgage broker and appraiser malfeasance is now available to facilitate some new regulation.

III. Comprehensive Reform is Needed to Stabilize the Consumer Financial Markets, Restore Consumer Confidence, and Protect Financial Institutions from Themselves

The legal and commercial systems that facilitated securitization of subprime and alternative mortgage loans were extremely adept at generating high volume. But, it did not reliably provide high quality services to consumers and investors. This problem stems from the legal incentives actors in the system operate under. The one uniform feature of residential mortgage law is its failure to recognize and account for the complex financial innovations that have facilitated securitization structures. Most of the relevant consumer protection law, including the Truth in Lending Act (1968), the Fair Debt Collection Practices Act (1977), the Equal Credit Opportunity Act (1974), the Fair Housing Act (1968), and the Federal Trade Commission's holder in due course notice rule (1975) all preceded widespread private label securitization of mortgage loans by over a decade. While this time frame is not meaningful in itself, it hints at a fundamental structural problem in the law. The authors of these laws wrote definitions and rules that are poorly adapted to the current marketplace. Left without a meaningful vocabulary amenable to regulation of securitized consumer loans, courts and regulators—including the Federal Trade Commission—have struggled to crowbar satisfactory policy outcomes out of legal rules and concepts which only vaguely relate to the commercial reality they purport to govern.

Taking one of many possible examples, the Truth in Lending Act and the Home Ownership and Equity Protection Act only govern the behavior of "creditors". This word suggests a unitary notion of a single individual or business that solicits, documents, and funds a loan. A creditor is currently defined as "the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness."[3] This definition is important since the private cause of action creating the possibility of liability under the act extends only to "any creditor who fails to comply" with the Act's requirements.[4] While this definition resonates with the notion of a lender as we commonly think of it, this notion that became entirely inconsistent with American reality in the past ten years. In the vast majority of subprime and alternative home mortgage loans, most of the actual tasks associated with origination of the loan, including especially face-to-face communication with the borrower, are conducted by a mortgage loan broker. Because brokers usually do not fund the loan, they are not the party to whom the loan is initially payable. The absurd result is that the federal statute which purports to promote useful and accurate disclosure of credit prices, does not govern the business or individual that actually *speaks* to a mortgage applicant. Rather, liability for the statute is confined to errors in the complex paperwork that many consumers have difficulty reading and are typically ignored in hurried loan closings long after borrowers arrive at decision on which broker and/or lender to use.

While this is only one example, more absurdities abound both in mortgage lending and in other areas of consumer finance:

- The Fair Debt Collection Practices Act often usually does not apply to mortgage servicers or even credit card companies;

- Banks and Thrifts can lawfully charge interest rates far in excess of the 45% per annum *per se* evidentiary trigger in the Consumer Credit Protection Act's criminal loan sharking law;

- The anti-kick back rule in the Real Estate Settlement Procedures Act does not prevent mortgage brokers from receiving a commission for selling a loan with a

[3] 15 U.S.C. § 1602(f).
[4] 15 U.S.C. § 1640(a).

higher interest rates than a borrower qualifies for based on the lender's own underwriting guidelines;

- The statutory damage awards for successful consumer litigants under most federal Consumer Credit Protection Act remedial provisions have not been adjusted for inflation in over forty years;

- The Truth in Lending Act's scope provisions exclude application of the act to non-residential loans of more than $25,000—precluding the application of the statute to loans for most family cars;

- Depository institutions can make triple-digit-interest rate loans through Automatic Teller Machines, without informing the borrower of an interest rate—or even that the borrower is obtaining a loan;

- Entire segments of the consumer finance industry have opted out of the civil justice system by burying small, arbitration clauses in their boilerplate contracts; and,

- The wealthiest country on earth has allowed its financial system to create numbers of financial refugees one would normally associate with a civil war or massive natural disaster.

It is against this backdrop that the F.T.C.'s performance and future abilities must be considered. In recent years, the F.T.C.'s consumer finance efforts have essentially focused on (1) a relatively small number of enforcement cases; (2) some limited consumer education conducted primarily through the agency's web page and some outreach in the press; and, (3) some interesting empirical research and policy development. While these efforts are doubtlessly well meaning—and perhaps the best the agency could have accomplished given its political, resource, and rulemaking constraints—they are not the sort of policies that have any serious hope of reforming American consumer finance. For example, while some estimate up to *six million* home foreclosures in the near future, the F.T.C. was only able to bring a total of *six* foreclosure rescue scam cases in the past year.[5] When compared to the magnitude of problematic consumer finance in the American economy, the Federal Trade Commission will not be able to help Americans without dramatic change directed from Congress.

If the federal government is going to succeed in comprehensively modernizing and reforming our consumer finance laws, it is likely that one of two plausible paths must be followed. First, Congress could attempt to pass a large, highly technical, and controversial bill that implements the needed changes across nearly a dozen different statutes, through many committees, and over the objection of powerful financial services industry advocates. Or second, Congress could pass the heavy and more technical lifting on such reforms to an administrative agency. The problem with the latter approach is that there is currently no agency both capable of and likely to handle the consumer protection challenges we face. Housing and Urban Development's exclusive focus on housing is too narrow to handle the integrated complexities of real estate and non-real estate related consumer finance. The Federal Reserve has technical proficiency, but also has a longstanding culture of approaching consumer problems from a banker's perspective. The political independence that insulates the Federal Reserve Governors from politics serves us well on monetary policy, but would temper the ability of Congress to encourage action on questions of consumer fairness and justice. Moreover, Congress *already* gave the Fed the authority to adopt many of the rules that might have prevented the mortgage crisis in the Home Ownership and Equity Protection Act of 1994, but the Governors chose not to meaningfully exercise that power. The O.C.C. and the O.T.S. have less expertise, fewer resources, and weaker consumer protection track records than the Federal Reserve. Of all the

[5] Prepared Statement of the Federal Trade Commission on "Consumer Protection and the Credit Crisis" before the Senate Committee on Commerce, Science and Transportation, February 26, 2009, at 14.

currently existing agencies, the Federal Trade Commission probably would hit closest to the mark—but might do so at the expense of focus on the F.T.C.'s many other important responsibilities, such as antitrust, advertising, privacy, product quality, and identity protection. The current crisis suggests that it may be time to seriously consider proposals calling for a new regulatory authority tasked with an exclusive focus on financial consumer protection.

Mr. RUSH. The chair thanks the gentleman. The chair now recognizes Mr. Rheingold for 5 minutes.

TESTIMONY OF IRA RHEINGOLD

Mr. RHEINGOLD. Thank you, Chairman, and thank you, Ranking Member Radanovich. It really is quite a honor to testify before you, Congressman Rush. I started my career as a consumer advocate in Chicago where I began a legal assistance foundation foreclosure prevention project, and I worked through the mid-90's dealing with all the mortgage crises that we had in Austin and Roslin, all over Chicago. And the things that we saw in Chicago in the 90's, we are seeing nationwide today. What I think disappoints me most about today's hearing is I am going to go through a litany of things that we consumer advocates saw in the 90's, saw in the early 2000's, and we see the exact same thing today. Nothing has changed except that things have gotten worse, and there has not been a federal response to it, including the FTC.

I think about the world I see. I run an organization called the National Association of Consumer Advocates. We are the private attorneys, the legal service attorneys across this country who actually do the consumer advocacy work. We are on the ground every single day representing consumers who are losing their houses or having their car repossessed or being harassed by debt collectors. We see what is going on there but the federal regulatory agencies and the FTC have not talked to us. So what do we have out here? Oh, I should mention I also run a project called the Institute for Foreclosure Legal Assistance, so I am in contact and talk daily with all the private attorneys, the legal service attorneys in the community who are actually fighting foreclosures. We are on the ground. We know who the bad actors are. We see the bad practices, and we see what is going on out there.

So what do we have? We have a completely broken mortgage lending industry. There is no question about it. Unfairness runs rampant. Bad lending practices are everywhere. We have a broken mortgage servicing system, completely broken. It is unaccountable. They can't figure out how much money people owe. They can't modify a loan to save their lives. We have seen, Chicago is a perfect example of it, a dual credit market. If you are middle income or rich, you have banks. If you are poor or you are low income, what do you have? You have currency exchanges and you have pay-day lenders, and you have rent to own, and you have refund anticipation loans. It is stealing wealth out of the communities that we care about most, and it has gone on unabated for the last decade with nobody really taking any real action and it is only getting worse.

We have a debt collection industry that is completely out of control. We have growth of a debt buying industry that is sort of mind boggling in the way they go about collecting debts without actually even knowing—not having the contract that the person actually had that debt originally from. They don't have any proof that that is owed, yet they are using our nation's court and using our nation's private arbitration system to collect debts against people. We have a broken credit reporting system where consumers can't get real access to their credit reports. They don't get the information necessary and they can't fix those reports once they are broken.

All of those things is what our credit market looks like today. And I went and talked with consumer advocates who I talk with every single day in this country. I asked them about the FTC and their role over the last 8 years and the last 10 years in protecting consumers. I will just pick some of the adjectives that I got responded, passive, antagonistic, irrelevant, disengaged, counterproductive, stuck in a world that doesn't regulate. They have not been part of the ballgame here. They can cite statistics. They can talk about some cases that they brought. In the scheme of things, it is mostly irrelevant. Now to be fair to them, they are under resourced, and there are good career attorneys there who do their best. But the fact is they have been disengaged.

I have been in Washington now 7 years after I left Chicago, and some day I hope to return. And on one hand I can count the conversations I have had with the FTC. We are the people out there doing this kind of work. We are out there on—it really is sort of mind boggling to me that we sit here today with the problems that existed 10 years ago and we have had federal regulatory agencies who have done nothing except exacerbated the problem. The Federal Trade Commission, as Chris said, was using the spoon to clean out an ocean. They simply did not do the job. There is a number of things that can be done to improve them. Hopefully in the new Administration they will be more assertive and more aggressive. They have been completely passive in using their unfairness authority. They need to use it. They need to declare things—we know when things are unfair.

When you give somebody a loan that they can't afford to pay back, that is unfair. It is not a really hard thing to figure out. They do need greater rulemaking authority. It is crazy. Six to 8 years to make a rule to protect consumers, that is just not the way it should work. Hopefully, they will have leadership, and I hope Chairman Leibowitz will demonstrate some leadership in terms of being assertive and aggressive in this area. They should have concurrent authority over the banks. There is a special place in regulatory hell for the federal bank regulators over the last 8 years and their complete failure to what has happened here. So hopefully the FTC can use of their consumer protection powers. I will stop there but be happy to answer any questions you might have about the FTC and the credit crisis we are facing.

[The prepared statement of Mr. Rheingold follows:]

Testimony of

National Association of Consumer Advocates

by

Ira J. Rheingold

Executive Director

Hearing Before the House Committee on Energy and Commerce

Subcommittee on Commerce, Trade, and Consumer Protection on

Consumer Credit and Debt: The Role of the FTC in Protecting the Public

March 24, 2009

Mr. Chairman, Ranking Member Radanovich, and members of the Subcommittee, thank you for inviting me to testify about our current consumer credit and debt crisis and the role the FTC could have and must now play in protecting American consumers.

My name is Ira Rheingold, and I have been a public interest attorney for my entire career. I have worked in some of our nation's poorest urban and rural communities and I've witnessed the incredible resilience and optimism that mark the great strength of our nation's people. I have also seen the incredible fear and despair of Americans faced with mounting debt, the loss of their long-term home and ultimately their inability to provide for their families.

In the mid-1990s through 2001, I lived and worked in Chicago, where I ran the Legal Assistance Foundation's Homeownership Preservation Project. During those years, I watched (and worked against) the unfair and deceptive practices of all the actors in the mortgage and credit industries, that slowly, but inexorably stripped away the wealth of that city's low and moderate income minority communities. Today, I am the Executive Director of the National Association of Consumer Advocates (NACA), an organization of attorneys and other advocates who represent those very same consumers and communities all across this country. At NACA, I also manage the Institute for Foreclosure Legal Assistance, a project that provides funding and training to non-profit legal organizations that help homeowners negotiate alternatives to foreclosure. In my current roles, I speak to and assist our nation's consumer advocates who, on a daily basis, meet with and represent the consumers victimized by bad lending practices and see the very real-life consequences of an out of control mortgage and credit marketplace. What I see from them are the same unfair and deceptive practices that I personally witnessed in Chicago, except now, those behaviors have moved across all of our nation's communities. What I hear from their clients is the same fear and despair that I heard all too often on the streets of Chicago. At today's hearing, I hope that you will hear their voices through me, and that you will begin to see what we all need to do to rebuild a federal consumer protection regulatory structure that actually serves the needs and demands of consumers and communities across our nation.

Introduction

By now, the collapse of the American credit system is a well-known story. Over the last several decades, as our consumer credit marketplace grew in dizzying complexity, the fundamental consumer protections necessary to keep order and fairness in place were simultaneously being eviscerated and abandoned. Through Congressional inaction, overreaching Supreme Court decisions, and federal regulatory agencies determined to protect credit providers from state consumer protection laws, we are now faced with a consumer credit crisis unmatched in our nation's recent history. While much can be said about the cynical and destructive role played by our federal bank regulatory agencies (a special place in the regulatory Hall of Shame is reserved for leaders at the Office of the Comptroller of the Currency and the Office of Thrift Supervision), my testimony today is focused on the role the Federal Trade Commission could have and should have played in preventing our current debt and credit crisis. In my testimony, I will explore what the FTC could have done to protect consumers; what it should be doing right now; and what additional authority it needs to successfully fulfill its role as the federal consumer protection agency.

The FTC's Role in protecting consumers

Fundamentally, the FTC is the sole federal agency whose role is to protect the American consumer. The agency has the authority to provide this protection through *rulemaking*, through its *oversight authority* and by bringing *enforcement* actions. While it's clear that the FTC's response to consumer protection in the credit market has been inadequate, it is worth looking at why this failure occurred and what we can do about it.

FTC's Rulemaking Authority

Under its rulemaking authority, the FTC has the ability to define "unfair or deceptive acts and practices (UDAP)." While this authority can be applied to all types of businesses, in the credit market the FTC's authority is somewhat limited because: (1) it doesn't have full authority over all financial services institutions; its ability to issue effective rulemaking is quite limited.

First, unfortunately, UDAP rule-making authority for federally chartered depository institutions is given to the Federal Reserve (for banks), the OTS (for thrifts) and NCUA (for credit unions.) While this may expressly limit the FTC's authority over these financial services institutions, if it was willing and aggressive, the FTC could still developed relevant UDAP rules that would apply unless their federal regulators specifically determined that the practice was not "unfair or deceptive" when a bank or credit union did it, or if the FRB determined that the UDAP rule would interfere with monetary and payment system functions.

Second, while a strong, aggressive consumer protection agency (unfortunately, not the FTC over the last decade) might have attempted to promulgate rules that declared a myriad of bad credit practices "unfair," even that type of agency might have been stymied by the unfortunate special rule-making procedures Congress imposed on the FTC in 1975. This so-called "Magnuson-Moss" rule-making is much more cumbersome, lengthy, and expensive, than the standard agency "notice-and-comment" rule-making procedure prescribed by the Administrative Procedures Act. Considering it took the FTC over 10 years, using these rules, to enact its' Credit Practices Rule, even if the FTC had the will to do good rulemaking, by the time the process was complete, the likelihood that the rule would have been relevant and effective in dealing with our current crisis is almost nil.

Oversight Authority

Another way an agency can get ahead of the curve to prevent abuses or stop them before they get out of hand is through the exercise of oversight authority. As a "generalist" agency charged with "consumer protection" over the entire market, the FTC has limited resources to carefully examine all the predatory and abusive practices that happen on a daily basis. Despite this obviously difficult task, the terrible problems that existed in the credit marketplace were obvious to many, and if the FTC had the "will" to actually engage in real oversight, much could have been done to protect the American public from the current credit crisis.

I think one of my biggest disappointments with the FTC is the agency's overall failure to engage with the people who should be their allies in their mission to protect consumers. As someone who talks to public, private and legal service consumer attorneys every single day, I very much believe that the FTC has fundamentally failed to engage the consumer advocacy community. If the agency had developed those relationships, it would have been well aware of the widespread abuses in the mortgage lending and servicing market, the incredible growth of fraud in the automobile financing world, the abusive payday lending industry tactics that specifically target our nation's service personnel, the evolution of a "debt-buying" industry that systematically collects debt that it has no proof is actually owed, the development of a fair credit reporting system that is neither fair or accountable to consumers and on and on and on.

Law Enforcement – Prosecutions and Deterrence

While the FTC has historically attempted to bring some enforcement actions against some of the bad actors in the consumer credit marketplace (most notably Associates, Household and Fairbanks), their lack of staff and resources, and more importantly the lack of political will at top of their agency has minimized the effectiveness of the results of these actions. Had the FTC been willing, like the Massachusetts Attorney General in its Fremont case, to use its "unfairness" authority to declare the lack of underwriting, risk-layering, poisoned products pushing business model that was prevalent in the mortgage market to be a violation of the FTC Act, a real stand could have been taken against our nation's corrupt mortgage lending system. Instead, the FTC's passive enforcement actions wound up identifying certain distinct practices that the mortgage industry learned to avoid, without doing anything to fundamentally alter the way this broken industry did business.

Recommendations for the Future

In examining what the FTC can and should do to ensure a fair and just consumer credit marketplace, I will first address the specific areas they need to focus on right now and then look at the structural changes needed to embolden the FTC to act as a real consumer protection agency

Enforcement Actions

If the FTC was engaged with the rest of the public and private consumer advocacy community, it would have no shortage of public enforcement actions to bring against bad actors and their "unfair" practices in the consumer credit marketplace. Possible enforcement actions would include the following areas:

Fair Credit Reporting Act

For the past eight years there has been little regulatory action in regards to the "Big Three" consumer reporting agencies (CRAs). Unfortunately, this inaction (and the last administration's failed philosophy that industry can police itself) has led to a completely broken system for investigating consumer credit report disputes and is rife with inaccurate information from furnishers, mismatched information in files, and abusive reporting by debt collectors and debt buyers.

Payday Lending

The FTC should prohibit payday lenders from holding a check or any electronic equivalent as security, and from taking any direct access to consumer's checking account. The practice by payday lenders of holding a post-dated check or an electronic debit authorization are coercive, injure consumers, and give creditors the unwarranted ability to exercise self-help remedies. Asking for a post-dated check against an account that does not have the funds to cover it is meant merely as a form of terror against the consumer. It exposes the consumer to bounced check fees, extortion that leads consumers to rollover their loans or take out multiple payday loans to cover the first, and the threat of criminal prosecution for a bad check. It gives the creditor a self-help remedy that prevents the consumer from asserting the claims and defenses, including wage exemptions, generally available against debt collection or predatory loans.

Debt Collection

The FTC should undertake an aggressive enforcement program against debt collection abuses. These days, typically debt collection agencies seldom have proof of the underlying account and rely on small claims courts and private arbitration forums to rubber stamp claims they cannot really prove through evidence. Furthermore, the FTC should declare unfair the debt collectors attempts to collect on time-barred debts, deceptive settlement agreements, putting old debt on new credit cards, and cross collection by refund anticipation lenders.

Debt Settlement Companies

The FTC's own workshop showed that these services benefit no more than 3% of the consumers who pay for them. The FTC should ban the charging of any fees to consumers until and unless their debts are actually reduced. Furthermore, fees charged by these companies need to be capped at a reasonably low percentage of the amount by which the debt is actually permanently reduced.

Auto Fraud

One of the single biggest complaints I hear from consumers and consumer advocates (particularly military legal service attorneys) is the incredibly abusive practices of car dealers and non-bank subprime lenders in the sale and financing of automobiles. The FTC can and must step up enforcement of the Used Car Rule, especially regarding rebuilt wrecks, laundered lemons, and "certified" vehicles where the warranties are represented as being in effect, but in fact are partially or entirely void. Furthermore, the FTC needs to examine and stop the standard bait and switch car financing practices that have left hundreds of thousands of Americans with unaffordable car loans.

Mortgage Servicing

It is clear to anyone reading the newspaper that the mortgage servicing industry is completely incapable of doing the loan modifications necessary to keep millions of Americans in their home. Equally clear, although not quite as publicly discussed is the mortgage servicing industry's fundamental structural problems which promotes the charging of unwarranted fees and limits the ability of a servicer to properly account for the payments made by distressed homeowners. Furthermore, it's an absolute scandal that mortgage servicer's across the country continue to bring foreclosure actions against homeowners without the basic proof necessary to establish that they have the right to take away a person's home.

While the above items are some of the actions the FTC can and should take using its existing "unfairness" authority, there are also substantive structural changes that need to be made so that the FTC can be a fully functioning and effective consumer protection agency.

Structural Changes

The FTC Should Receive Enhanced Rulemaking and Civil Penalty Authority.

As I described earlier, even if the FTC had the political will to tackle the terrible abuses that existed in the credit marketplace, their archaic Magnuson-Moss rule making authority would have prevented the agency from actually promulgating effective rules. For the FTC to be an effective consumer protection agency, they must be given APA rulemaking authority, as well as clear rule-writing authority under the FTC Act and the Fair Credit Reporting Act. Congress should also urge the FTC, when it engages in rulemaking, to be willingly to aggressively use its unfairness authority.

The FTC Should Have Concurrent FTC Act Authority over National Banks, Thrifts and Credit Unions.

Unlike the federal banking agencies, who besides clearly demonstrating that they neither have the political will, ability or desire to protect consumers, also have a "safety and soundness" function, the FTC's sole focus is to protect consumers. As the only federal agency that has no conflict of interest from the fee income it receives, has no fear that aggressive enforcement will lead to charter-shopping, and hopefully does not view banks, thrifts and credit unions as their customers, it is essential that the FTC's unfairness rulemaking applies to all financial service institutions.

There Should Be a Private Right of Action and State Attorneys General Must Be Allowed to Have Greater Enforcement Rights Under the FTC Act.

Even an actively engaged and aggressive Federal Trade Commission will never have the resources to stop all the bad practices that exist in the American credit marketplace. Despite the recent demonization of private and legal services consumer attorneys, they play an absolutely essential role in keeping the consumer market functioning in a just and fair manner. For consumers to have real protection, these attorneys, and our state's attorneys general, must be given the power to assist the FTC in enforcing the federal UDAP statute.

Aiding and abetting liability

In today's complex marketplace, few transactions involve only a consumer and seller of goods or services. Clarifying aiding and abetting liability will help assure that all those involved can be reached by the law.

Conclusion

During the last decade, the Federal Trade Commission failed to protect consumers from the unfair and deceptive practices that have led to the collapse of our nation's mortgage and credit markets. I can only hope that with additional resources and expanded authority and with a new found political will to aggressively use its unfairness authority, the FTC will return to its place as an agency committed, above all else, to consumer protection.

Mr. RUSH. Thank you. The chair now recognizes Mr. Benson for 5 minutes.

TESTIMONY OF NATHAN BENSON

Mr. BENSON. Good morning, Chairman Rush, Ranking Member Radanovich, and members of the subcommittee. My name is Nathan Benson, and I am the CEO of Tidewater Finance Company, which was established in 1992 to purchase and service retail installment contracts. The company is based in Virginia Beach, Virginia, and has two lines of business, Tidewater Credit Services for consumer goods and Tidewater Motor Credit for auto services. I am here today in my capacity as a board director of American Financial Services Association, AFSA, whose 350 members include consumer and commercial finance companies, auto finance companies, card issuers, mortgage lenders, industrial banks and other firms that lend to consumers and small businesses. AFSA appreciates the opportunity to provide testimony to the members of the subcommittee.

Today, I will focus my testimony on the role that the Federal Trade Commission has played, and continues to play, in helping to restore confidence in the financial services industry. I will also address the installment loan industry's importance in providing access to credit to millions of Americans. The FTC is the effective regulator. The FTC has been very successful in enhancing consumer protection under its current authority. It has addressed the economic crisis in two ways, first, by using its enforcement authority under Section 5 of the FTC Act to pursue bad actors in the sub-prime mortgage industry, and, second, by setting federal policy through guidance and public comment. I will start by providing some examples that fall into the first category.

The FTC successfully negotiated a $40 million settlement with Select Portfolio Services in November 2003 for engaging in unfair and deceptive practices in servicing sub-prime mortgage loans. The settlement was modified in August 2007 to provide additional protections to borrowers, including mandatory monthly mortgage statements, a 5-year prohibition on marketing optional products such as home warranties and refunds for foreclosure attorney fees for services that were not actually performed. The FTC has entered into a $65 million settlement with First Alliance Mortgage Company for making deceptive sub-prime mortgage loans. The FTC distributed the $65 million to nearly 20,000 affected borrowers.

The FTC has successfully pursued other sub-prime mortgage lenders engaged in what the Commission deemed to be inappropriate conduct, including Capital City Mortgage Corporation and Quicken Loans. I want to just move on to the installment lending and its role in providing credit to consumers. At the outset, let me say that AFSA shares Congress' concern about predatory lending. We support the goal of protecting consumers from unfair, abusive, or deceptive lending and servicing practices while preserving access to responsible lenders.

The installment lending industry was born in 1916 out of a need to provide credit to working men and women. The Russell Sage Foundation worked with lenders to develop a set of principles by which they would abide in their lending activities. Lenders agreed to make the cost of their loans transparent so that borrowers understood the true cost of the loan. Loans would be structured over a period of time allowing a repayment schedule that was long enough to match the earning power of the borrower. Finally, the lender would price the loan based on the character of the borrower, which was defined as a combination of the borrower's employment stability and previous history of handling credit.

Today's installment lenders are a key element in improving the socio-economic status of poorer citizens and supporting our company's economic health. They do this by adhering to basic principle of economics, that people should borrow so they can consume based on their permanent income, and that such consumption is the fuel of our economy. Typically, the middle and upper class borrow through traditional banking and financial services relationships. However, average wage earners with few financial assets often cannot borrow in this way. Traditional banks simply are not equipped to offer products and services to these consumers in a manner that is profitable for the enterprise. As a result, these consumers need access to safe forms of small-sum credit. These are the very products the installment loan industry, an industry fully and completely regulated and examined at the state level, have been providing successfully for decades.

Certainly, people turn to installment lenders for multiple reasons. Key among these, however, is the need to access small sums to deal with unforeseen circumstances. I could go on but if there are any questions.

[The prepared statement of Mr. Benson follows:]

HOUSE COMMITTEE ON ENERGY AND COMMERCE

SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER PROTECTION

Hearing on:

Consumer Credit and Debt: The Role of the Federal Trade Commission in Protecting the Public

Tuesday, March 24, 2009

WRITTEN TESTIMONY OF NATHAN BENSON
CHIEF EXECUTIVE OFFICER
TIDEWATER FINANCE COMPANY, INC.
ON BEHALF OF
THE AMRICAN FINANCIAL SERVICES ASSOCIATION

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Today, I will focus my testimony on the role that the Federal Trade Commission (FTC) has played – and can continue to play – in helping to restore confidence in the financial services industry. I will also address the installment loan industry's importance in providing access to credit to millions of Americans.

FTC: Effective Regulator

The FTC has been very successful in enhancing consumer protection under its current authority. It has addressed the economic crisis in two ways: first, by using its enforcement authority under Section 5 of the FTC Act to pursue bad actors in the subprime mortgage industry, and second, by setting federal policy through guidance and public comment. I'll start by providing some examples that fall into the first category.

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The FTC has successfully pursued other subprime mortgage lenders engaged in what the commission deemed to be inappropriate conduct, including Capital City Mortgage Corporation and Quicken Loans, Inc. In September 2008, the FTC settled charges that EMC Mortgage Corporation and its parent, The Bear Stearns Companies, LLC, violated Section 5 of the FTC Act, the Fair Debt Collection Practices Act (FDCPA), and the FCRA in servicing consumers' mortgage loans, including debts that were in default when EMC obtained them.

In addition to pursuing bad actors in the subprime mortgage industry, the FTC has helped to improve lending practices by issuing guidance and submitting public comments to the federal banking agencies. In June 2007, the FTC released a Staff Report on Improving Consumer Mortgage Disclosures. In addition, the FTC conducted a study on the effectiveness of mortgage loan disclosures and found that current disclosures do not adequately explain mortgage loan terms and costs to consumers. The FTC provided comments to the federal banking agencies that consumers would benefit from a single disclosure that consolidates the disclosure of important features and costs of a mortgage loan and encouraged them to conduct consumer research to ensure that the proposed disclosures would be effective.

In the area of credit advertising and marketing, the FTC has brought numerous enforcement actions against lenders, brokers and others in violation of the FTC Act or the Truth in Lending Act. In mortgage advertising, for example, the commission has brought actions against mortgage lenders or brokers for the deceptive marketing of loan costs or other key loan terms, such as the existence of a prepayment penalty or a large balloon payment due at the end of the loan. The commission settled with three mortgage lenders charged with using ads that touted low interest rates and low monthly payments, but did not adequately disclose that the low rates and payment amounts would increase substantially after a limited period of time.

Moreover, the FTC has used all the tools at its disposal to increase its protection of consumers in the later stages of the credit life-cycle. The FTC has brought enforcement actions against those who engage in unfair or deceptive acts and practices in violation of Section 5 of the FTC Act, as well as against those who violate specific credit statutes, such as the FDCPA and the Credit Repair Organizations Act ("CROA"). The agency has created and distributed extensive consumer education materials about debt collection, debt relief services, credit repair, foreclosure rescue scams, and other financial services topics to assist consumers in financial distress in taking steps to protect themselves. The FTC has conducted cutting-edge empirical research on how to improve mortgage disclosures and engaged in comprehensive policy development activities related to debt collection and debt settlement.

Installment Lending: Beneficial Credit

I'll now move on to installment lending and its role in providing credit to consumers. At the outset, let me say that AFSA shares Congress' concern about predatory lending. We support the goal of protecting consumers from unfair, abusive, or deceptive lending and servicing practices while preserving access to responsible lenders.

The installment lending industry was born in 1916 out of a need to provide credit to working men and women. The Russell Sage Foundation worked with lenders to develop a set a principles by which they would abide in their lending activities. Lenders agreed to make the cost of their loans transparent so that borrowers understood the true cost of the loan. Loans would be structured over a period of time allowing a repayment schedule that was long enough to match the earning power of the borrower. Finally, the lender would price the loan based on the character of the borrower, which was defined as a combination of the borrower's employment stability and previous history with handling credit.

Today's installment lenders are a key element in improving the socio-economic status of poorer citizens and supporting our country's economic health. They do this by adhering to a basic principle of economics: that people should borrow so they can consume based on their permanent income, and that such consumption is the fuel for our economy. Typically, the middle and upper classes borrow through traditional banking and financial services relationships. However, average wage earners with few financial assets, often cannot borrow in this way – traditional banks simply are not equipped to offer products and services to these consumers in a manner that is profitable for the enterprise. As a result, these consumers need access to safe forms of small-sum credit. These are the very products the installment loan industry -- an industry fully and completely regulated and examined at the state level -- have been providing successfully for decades.

Certainly, people turn to installment lenders for a multitude of reasons. Key among these, however, is the need to access small sums to deal with unforeseen circumstances. Take for example, an unanticipated car repair. Keeping one's vehicle in good repair is essential to allow travel to work. Absent access to small sums over and above a wage, the repairs necessary for such travel may not be possible, and could easily result in job-loss. Likewise, the back-to-school period increases the demand for installment loans, as parents look to equip their children appropriately for the coming semester. Many less-advantaged citizens in our country do not have access to the kinds of credit cards and financial offerings available to the more fortunate, and have long relied on access to small-sum installment loans to meet their credit needs. And, they have proven that they can and do make good use of borrowed money, even if they sometimes struggle to demonstrate their creditworthiness to lenders.

While not all small-sum loan products are alike, some view installment lenders and payday lenders through the same lens. However, these two separate industries could not be more different, despite their mutual focus on small-sum lending. Consider the following:

- Installment lenders provide loans in amounts not offered by the traditional banking community. In fact, according to the Federal Reserve Board's recent G-19 report, non-bank financial services companies make 50 – 55% of consumer loans in this country.

- Installment lenders do not impose pre-payment penalties on their customers.
- Installment lenders work out a borrower's ability to repay a loan before making it, using a monthly net income/expense budget based on information provided by prospective borrowers. This ensures that proposed monthly loan payments are affordable.
- Installment lenders check the credit of borrowers when making loans to allow a realistic assessment of the borrower's ability to repay. What's more, installment lenders report to credit bureaus, providing the opportunity for borrowers to build and improve their credit histories. The bureaus do not accept reports from payday lenders. This means that even the most conscientious payday borrower can only be in good standing at the shop with which they have a relationship – their timely payment history and the benefits that brings will never be made known to the mainstream lending industry.
- Installment lenders structure payments as monthly installments, rather than a single payment, in order to provide a manageable method of repayment, allowing borrowers to pay off interest and reduce principal and interest accrual.
- Installment lenders accept and hold the risk of default, with little legal recourse.

Consumer advocates agree. In 2003, a Consumers Union report stated that installment lending " . . .provides a clearly safer and more affordable alternative to high-risk, high-cost payday loans."

As access to credit shrinks, it is important that installment loans are differentiated from other more risky forms of credit and continue to be available to those individuals and families that need them. Installment loans remain a safe option for small-sum credit.

As policymakers grapple with unprecedented economic challenges, care must be taken that new regulatory initiatives do not inadvertently stifle economic recovery. The President himself has talked of the importance of getting credit flowing to consumers and businesses. Any regulation that would restrict this flow runs counter to the intentions of stimulus efforts aimed at kick-starting a stalled economy.

The importance of installment loans as safe, convenient and affordable sources of credit increases in times of economic hardship. Maintaining consumer access to safe forms of credit is an important part of the economic recovery process. Installment loans are already playing their part in this and will serve to extend and support stimulus activities.

The government economic stimulus plan aims to ensure the survival of the banking system and reinvigorate the economy through the government spending component of Gross National Product (GNP). Installment loans provide a direct, immediate boost to consumer spending which is the largest and most dynamic component of GNP, unfiltered by the medium of government grants to commercial banks. Any proposed price cap will eliminate this boost and harm the very consumers the stimulus package is intended to help.

Notwithstanding the tightening in market-based funding, installment lending has continued unabated in the current financial crisis, keeping funds in circulation without any external stimulus. This must be allowed to continue.

Again, Mr. Chairman I appreciate the opportunity to testify here today and would be happy to answer any questions Members may have.

Mr. RUSH. Thank you. I certainly want to thank the panel for their excellent testimony. The chair now recognizes himself for a round of questioning for 5 minutes. I want to address my first question to the entire panel, and each one of you can take a few seconds to answer the question as you will. Most of you have testified this morning that the FTC has not done enough to address consumer credit issues over the past years, particularly over the last 8 years. And let me just ask each one of you, do you believe that this has occurred because of a lack of action, political or structure in nature? In other words, do you believe the Commission has failed to act because of a lack of will or because of some underlying obstacles such as the lack of statutory authority, the lack of resources, burdensome procedures, or all of the above? If you could explain to me in your answer why you believe the FTC has failed to act. Mr. Tierney.

Mr. TIERNEY. Well, we can go in the same order, Congressman. I think it is clear that the leadership of the Federal Trade Commission at the very highest level in the last 8 years, very highest level, shared the de-regulatory philosophy that was predominant at the time, and the philosophy was clearly stated to state attorneys general on a regular basis that you were vicious intermeddlers, you were denying credit to people who need it, you are applying the wrong standards, that we should let the marketplace prevail and it will be a self-regulatory procedure. And although time and again attorneys general would expressly predict, it turned out conservatively, a million home foreclosures they were characterized as alarmists, not necessarily by the Federal Trade Commission but by the tone of the times and by the interest groups that surrounded the Commission, so the Commission at the top reflected the reality.

I would also make another smaller point that our past two presidents have persisted in naming people to the Commission with an anti-trust background, not a consumer protection background, and that is a bipartisan characterization of our past three presidents actually. And that it would be a really good idea if the Federal Trade Commission had someone on the Commission who had a consumer protection background, and, secondly, actually had worked with the states and did not come from a large law firm or from the Hill. And I don't mean the personal characterization, but I really do believe that the FTC is lacking that kind of background and experience at the very highest level.

Mr. RUSH. Does the other panel want to weigh in on this?

Mr. PETERSON. I do. I would like to say that in the past 12 years it has been primarily a political or lack of willpower issue, but going forward it is more likely to have something to do with the structural issues. I think that there are structural problems but even if 12 years ago we had cleared out all those structural problems they still wouldn't have done anything. Going forward, I think they are going to try and do some things now, and it is going to be harder for them to do it than it should be because of the structural barriers and it would probably help if we cleared some of those out. But even still, I think we are still talking about tinkering with things. We are not talking about the magnitude change that needs to happen in order to help facilitate more efficient and effective commerce.

Mr. RHEINGOLD. I would concur with my fellow panelists, I think a lot of it was ideological. I think there was this notion that self regulation would work and the FTC should not interfere in the commerce of credit, so I think that is part of it without a doubt. And in part that is why a lot of consumer advocates did not engage with the FTC and the AGs didn't engage with the FTCs because we fear that the work we did would actually be undercut by their philosophy. I do think that resources are a significant problem there. They have an awful lot of jurisdiction. They have very limited resources. They have very little rulemaking, and I also agree that if they had that authority over the last decade nothing would have changed, but I think going forward we have some opportunity to do something.

Mr. RUSH. Mr. Benson, I have 30 seconds so please.

Mr. BENSON. Yes. We felt that through those cases that they have done anything about, that has affected over 10,000 people, and when they pick on an entity in an industry that has helped everyone that is tied to that industry, so it is not just that entity that is being affected. It is everyone in that environment that gets cleaned up pretty quick, so we think they have been pretty effective. When they pick on one entity it goes through to the whole industry doing the same things, so we think so far they have been effective.

Mr. RUSH. Thank you very much. The chair now recognizes the ranking member, Mr. Radanovich, for 5 minutes.

Mr. RADANOVICH. Thank you, Mr. Chairman. Mr. Benson, welcome to the subcommittee. I appreciate your testimony. I want to start off with you on a couple of questions. Do you believe the FTC needs APA procedures in order to be effective or can it use the existing authority that it has to effectively regulate the industry?

Mr. BENSON. We believe that it can use its existing authority that it has.

Mr. RADANOVICH. Let me ask you, how can regulation be used to reduce fraud without adding unnecessary compliance costs that are inevitably passed on to the consumer?

Mr. BENSON. Well, most of our members through AFSA are state regulated so we are controlled by them. We are in favor of disclosure with all our members, so we work with those people so we believe with full disclosure and with obviously the regulations with the state, we believe that fraud will come out as long as it is monitored.

Mr. RADANOVICH. I was looking at the new sample disclosure form by the FTC, which I thought was kind of interesting. Can you tell me your opinion of it? It seems it is easy to read. Have you seen it?

Mr. BENSON. No, we haven't seen it.

Mr. RADANOVICH. OK. OK. My first glance at is it is something that looks kind of positive. I was curious to know what your thoughts would be on it.

Mr. BENSON. As I said earlier, our view is more disclosure and the simpler it gets, a lot better it is.

Mr. RADANOVICH. OK. One last question. The FTC has proposed disclosure simplification forms for mortgage—I think you have already answered that one. Thank you, Mr. Benson. I appreciate that. Mr. Rheingold, can I ask you, you testified that the FTC—that had the FTC had the will to actively engage in oversight much of the current credit crisis could have been avoided. We are talking about increasing authority through the APA and we are discussing that additional authority. Isn't that kind of a duplicative entry statement?

Mr. RHEINGOLD. I don't think so. I actually think there are two things happening here, and I think to be fair the FTC was not the controlling regulatory agency. The OCC and the OTS really failed and they had a lot of things that they could have done to prevent the disaster we have today. I think the OCC through its enforcement powers, if they in fact had been effective enforcers and using those decisions, I think the perfect example of a strong enforcement agency can do is what the Massachusetts AG did in the Freemon case where they brought a case against the mortgage company who was engaged in unfair practices, where they were making loans that people could not afford, and using the unfairness authority that court declared that these practices, A, B, C, and D, making a loan at a teaser rate that explodes and people can't afford it is unfair.

Making a loan to people over 50 percent of their gross income is per se unfair. If the FTC would have taken some of those actions, even in the Fairbanks case there was an opportunity to declare certain practices that the service industry does as unfair, it could have had a real impact on the type of practices that exist throughout the mortgage industry.

Mr. RADANOVICH. Using that example, where was the problem then? Was it in the lack—was it in the application of Magnusson-Moss or was it——

Mr. RHEINGOLD. Well, I am talking about their enforcement power. There is a difference between rulemaking—there are a couple of ways that they can set the law. By bringing in—if the FTC brings an action and gets a court order that declares as part of their court-agreed order that this practice is unfair, that will have a pretty large impact in terms of the rest of the industry because it will send a clear signal that this is an unfair practice and hopefully would stop it. That is one way they could do it, through their court enforcement procedures.

I think the easier thing they could have done if they, in fact, had normal every day authority to make rulemaking is they could have done that without having to bring court cases. And the fact is, as someone who has been a veteran of dealing with a lot of the rulemaking that is done through all sorts of regulatory agencies, industry and consumer groups have ample opportunity through the APA procedure to get their voices heard and influence that process. And the notion that they need 6 to 8 years with this lengthy, excuse me, cockamamie system of developing a way of rulemaking really it is counterproductive and useless, and anything that they could do with the current system that we have in place if it takes 6 to 8 years by the time you get a decision the problems out there would have evolved to something completely different.

Mr. RADANOVICH. All right. Thank you very much, Mr. Rheingold. I yield back, Mr. Chairman.

Mr. RUSH. The chair thanks the gentleman. The chair now recognizes the gentlelady from Ohio, Ms. Sutton, for 5 minutes.

Ms. SUTTON. Thank you, Mr. Chairman. We have heard repeatedly here today about some of the shortcomings of what we are trying to accomplish in the process that now exists. A couple of those, of course, revolve around the fact that the FTC, we hear over and over again, doesn't have the authority over banks that it has over other entities, and we also hear about the rulemaking process being too cumbersome, but I guess one of the questions for this committee and for the Congress and for all of us here is if the FTC had rulemaking authority that was more streamlined, APA rulemaking authority, and they had greater authority over the banks, and they had resources to do the job, is it better for the FTC to be the agency that deals with this or some of you have suggested there should be a new entity to do so. If you could just answer those questions for me, I would appreciate your opinion.

Mr. TIERNEY. I guess I would say, Congresswoman, I, like many of us, was studying the proposal by Professor Warren. It has been called the so-called Durbin-Delahunt bill. I have not taken a position on it yet but it has a lot to it. But, if I may, to go back to your earlier point about pay-day lending, and remember the name of the song, If You Can't Be With the One You Love, Love the One You're With, we have enough authority now between the states and the trial lawyers and the legislatures and the Federal Trade Commission. If we just want to do something and focus on the problem such as pay-day, take the resources we have, set a national strategic goal, and just go do it.

And my concern about discussion of the larger institution is that while we play that huge congressional effort that goes on for so long, that we have millions of people suffering every day, and we should do something right now.

Mr. BENSON. I believe that the way you regulate it, and I am the only, I think, business person here, is you got to have some skin in the game, you got to have some money in the game, so if you are going to securitize you got to have—someone has got to hold a portion of the securitization on the books. If you are going to have loans out there, you got to have the risk factor, that you shouldn't be able to go and draw on someone's back account. You should be able to analyze the person's credit, make the loan that they can afford over time, payments over time, equal payments. That would solve the problem rather than the risk factor. When you have got nothing at risk, the issues come out.

Mr. PETERSON. If I could, I think that a new agency is the way to go. That is my honest opinion. The second choice would be the Federal Trade Commission. I don't think you should give it to the Federal Reserve Board. They have demonstrated that they are bankers at their heart and soul, and they have the authority to pass—they have extensive authority under the 1994 Home Ownership and Equity Protection Act. You passed that statute and gave them all the power that they needed and they did nothing. The Federal Reserve Board could have stopped this easily with their rulemaking authority under HOEPA, and they didn't do anything, so what is to think that that is going to change now?

And what is more with the Federal Reserve Board, they have so much political autonomy. It is so hard to exercise oversight over them because of their justified and needed monetary policy independence. I just don't think that it is a good political entity that is going to be at the beck and call of Congress and will be responsive to the people. It is time for a new consumer finance regulator that deals with these types of questions, and if you can't get that passed the Federal Trade Commission is the next best choice. But the problem is that the FTC has a lot of other important stuff to do. It needs to be out there on the anti-trust watchdog beat. It needs to be dealing with privacy issues, telemarketing issues, all very important issues, and very different than the consumer finance problems that we are talking about now. If this is ever going to happen, it is now, and if you don't do it now it will never happen, and we will continue to suffer from these systemic problems for the next 50 to 100 years.

Mr. RHEINGOLD. I agree.

Ms. SUTTON. Is that an I agree, Mr. Rheingold?

Mr. RHEINGOLD. I absolutely agree.

Ms. SUTTON. OK. Thank you, and I yield back.

Mr. RUSH. The chair thanks the witnesses. We don't intend to go into a second round of questioning. I think that we have been well served by both panels today, and the chair really again—we are most grateful to this panel for the extensive use of your time. And we want to commend you on your patience with us through this particular issue. I just want to note that all witnesses should be prepared to receive and answer written questions from members of this subcommittee. And with that, thank you very much.

Mr. BENSON. Could I ask that my complete statement be included in the record?

Mr. RUSH. So ordered. And I would like to request unanimous consent to enter into the record a statement from the organization, Public Citizen. Without objection, so ordered.

[The information was unavailable at the time of printing.]

Mr. RUSH. This subcommittee now stands adjourned.

[Whereupon, at 12:30 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

Statement of
Representative John D. Dingell
Committee on Energy and Commerce
Subcommittee on Commerce, Trade, and Consumer Protection
Hearing on "Consumer Credit and Debt: The Role of the Federal Trade Commission in Protecting the Public"

March 24, 2009

Thank you, Mr. Chairman. As a result of the Nation's grave recession, the Congress has focused much attention on lending practices in the housing market. Although the Federal Trade Commission is prohibited by statute from regulating non-bank entities, it does retain the authority to prosecute unfair and deceptive practices by non-traditional lenders. As nearly half of the lending during the recent housing bubble was done by non-traditional lenders, one would assume the FTC has a vital role to play in protecting consumers from abusive practices in the credit and debt markets. Nevertheless, the FTC's ability to function as a vigorous defender of consumer prerogatives in this arena is hampered through a number of statutory roadblocks, including a lack of coordination between Federal regulatory agencies when promulgating rules and the constraint upon the FTC to abide by the cumbersome rulemaking procedure known as "Magnusson-Moss," which can last as long as ten years.

In recognition of these lamentable deficiencies, I co-sponsored and the Committee on Energy and Commerce favorably reported H.R. 3526 to the full House during the 110th Congress. With respect to consumer credit and debt, this legislation would have expanded the number of agencies authorized to issue regulations under the Federal Trade Commission Act to combat unfair and deceptive acts or practices, promoted better coordination and cooperation among agencies while such regulations were being promulgated, and allowed the FTC to circumvent the Magnusson-Moss process by permitting it to conduct rulemakings under the Administrative Procedure Act. Especially in light of the outcry by several of my colleagues that rules adopted by the Federal Reserve under the Homeownership and Equity Protection Act were too lax to offer appreciable protection to consumers from fraudulent lending practices, I would submit that H.R. 3526 remains essential and must be enacted into law.

All of this in mind, I would caution that H.R. 3526 is but one of several necessary steps to combat unfair and deceptive lending practices. As I mentioned during this Subcommittee's hearing on consumer protection in the used and subprime car market, I recommend that we consider strengthening the ability of the FTC to enforce penalties for abuses visited upon consumers, for example by granting it the authority to impose civil penalties for violations of section five of the Federal Trade Commission Act.

I look forward to working with you, Mr. Chairman, in crafting sensible and balanced legislation to protect consumers from unscrupulous lenders. Thank you, and I yield back the balance of my time.

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